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**DE-POSITIONING SOVEREIGNTY : LAW AT THE LIMITS
OF THE POLITICAL**

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**A thesis submitted in fulfilment of the requirements of the
degree of Ph.D.**

School of Law, Birkbeck, University of London.

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Abstract

Sovereignty is regularly characterised in juridico-philosophical discourse as an illimitable power 'beyond law'. It is territorialized, equated with the nation-state, delimited in space and time, and thus regarded as having a finite presence as the symbol of a particular 'political community'. Sovereignty is also treated as an infinite power which transcends juridical limits. The central thesis developed here is that sovereignty is at once finite *and* infinite (in-finite). The objective of this thesis is to elaborate this ambivalent 'position' of sovereignty in relation to law. The thesis seeks to 'de-position' monistic conceptions of sovereignty through a critical examination of the delimited *and* illimitable presence, the *in-finitude*, of sovereignty.

The opening concern of the thesis, then, is to identify the in-finitude of sovereignty in the telling instance of Australian 'postcolonial' law. In Australia, an imperial sovereign assertion which treated the continent's indigenous people as barbarous and without a 'settled law' needed to be rendered 'finite' – that is, delimited – so that this sovereign excess could be disavowed in the process of inaugurating a 'postcolonial' law and society. A 'finite' sovereign event that took place 'back then' was central to re-presenting the juridical order as 'post-racist' and 'postcolonial'. However, the imperial sovereign 'event' also needed to be preserved as the 'infinite' ground of present and future law and society. Sovereignty is thus imbued with a 'finite' and 'infinite' quality in the 'postcolonial' context. The question which then arises is how the contradictory lineaments of in-finite (finite and infinite) sovereignty are sustained.

The second concern of this thesis, then, is to demonstrate how in-finite sovereignty is impelled and sustained through the juridical limits of 'political community'. For instance, Australian 'postcolonial' law positions the imperial sovereign event beyond law as this 'event' purportedly grounds, symbolises or sustains a stable political community. By demonstrating how *law* inscribes the monistic character of sovereignty with reference to the 'political', the 'pure facticity' or unitary presence of sovereignty is undermined. In Australia the primacy of the 'political' is instantiated through the insistence of one 'law of the land'. A central

claim made in this thesis is that 'jurisdiction' is the phenomenon through which the co-presence of sovereignty, law and the political is sustained.

The argument that in-finite sovereignty is sustained through law's unceasing 'positioning' of sovereignty/law with reference to the stability of political community is also elaborated through an examination of the notion of 'jurisdiction' in a neo-imperial context. The 'war on terror', a context seemingly different from 'postcolonial' Australia, reveals the pervasiveness of in-finite sovereignty, and thus the wider purchase of the account developed here. U.S. Courts, in deciding whether to grant the writ of *habeas corpus* to those detained in Guantanamo Bay, inscribe the in-finite position of the sovereign by determining the limits of jurisdiction. The analysis of these *habeas* cases demonstrates the wider significance of the argument developed in this thesis – that the contradictory lineaments of in-finite sovereignty are sustained through law's re-positioning of sovereignty with reference to the political.

The thesis closes by considering imperial sovereignty at its outer limits – the im-possibility of sovereignty as 'worldwide' authority or 'Empire'. This serves three functions: it emphasises the significance of 'postcolonial' sovereignty for developing an account of neo-imperial sovereignty, considers what it would mean for imperial sovereignty to be overcome, for it to be moved to a 'non-place', and suggests why the account of the relation between sovereignty and law as a problem of finitude should inform juridico-philosophical approaches to sovereignty. The conclusion stresses that while it is not possible to simply do away with sovereignty, the im-possibility of absolute sovereign authority offers a basis for imagining how sovereignty can be moved to a 'non-place'. Sovereignty de-positioned by law, sovereignty as contained and unconditioned, that is, in-finite sovereignty, exposes the limit of what is usually regarded as illimitable.

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Introduction

Why 'sovereignty'?...the trait of sovereignty ...
The first and last question, if not the only one,
could then become: What happens when this trait
divides? When it must, when it cannot not divide?
When its division follows from the necessity of a
law that is undecidably that of a duty or a fate?

Jacques Derrida, "Provocation: Forwards" in
Derrida, *Without Alibi* (2002), xix.

In 1993 the Wiradjuri Aboriginal people of New South Wales, Australia, sought a declaration from the High Court of Australia that they were a "sovereign nation of people", a claim that was adverse to the sovereignty held by the Crown (*Coe v Commonwealth (No 2)* (1993), 112).¹ The Wiradjuri also claimed, in the alternative, that they were a "domestic dependent nation" or "a free and independent people" (*ibid*). Their claim asserted the existence of some form of Aboriginal sovereignty, including the limited kind expressed through the notion of a 'domestic dependent nation'.² At the heart of their claim was the question of whether the Crown's sovereignty could be challenged, and indeed, whether it could be 'divided' or shared. No such divisibility of sovereignty was permitted by the High Court. The Aboriginal claim to sovereignty was struck out. Chief Justice Mason stated that the various ways in which the plaintiff put the sovereignty claim can have no basis in domestic law and can have "no independent legal significance" (*ibid*, 115). This formulation implies that sovereignty can have a basis in domestic law, but also that it can occupy a position apart. Chief Justice Mason's precarious formulation denies the possibility of Aboriginal sovereignty independent of the Australian legal system. It affirms the

¹ The High Court is the highest court in Australia.

² The latter kind of sovereignty was derived from the expression by Marshall CJ in *Cherokee Nation v State of Georgia* (1831), 17.

Crown's assertion of sovereignty over Australia and recognises that it is the only sovereignty of 'legal significance'. Australian law refuses to recognise Aboriginal sovereignty. There can be no position apart for these natives, nor could they assert self-determination within the Australian juridical order. This decision neatly encapsulates the problem taken up for investigation in this thesis: what account can be given of the 'position' of (imperial) sovereignty in relation to law?³

The decision to refuse the Wiradjuri claim reiterates, with palpable fragility, the long standing view that the British Crown's acquisition of sovereignty over Australia is not justiciable in a municipal court.⁴ The conclusion that the plaintiffs' claim lacked 'independent legal significance' expresses a pragmatic stance which 'positions' the (re)treatment of colonial sovereignty 'outside' the competence of municipal law. A more candid expression of this stance can be found in the decision of Justice Jacobs who, in 1979, stated that a claim of sovereignty adverse to the Crown "is not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged" (*Coe v The Commonwealth (No 1)* (1979), 410). These statements by the Australian High Court manifest the essence of the problematic that I take up for investigation in this thesis. If courts both eschew and preserve the imperial sovereign assertion, how are these contradictory lineaments

³ Though I have drawn on the claim to Aboriginal sovereignty in *Coe (No 2)* (1993), this thesis is not about 'Aboriginal sovereignty' as such. At the beginning of *Chapter One* I will locate the decision in *Coe (No 2)* in the history of courts' treatment of (imperial) sovereignty and its implications for the indigenous people of Australia. I will also return, at the conclusion of *Chapter Four*, to reflect on the implications of my enquiry for indigenous claims for self-determination.

⁴ A litany of cases including *New South Wales v The Commonwealth* (1975); *Coe v The Commonwealth (No 1)* (1979); and more recently, *Mabo v Queensland (No 2)* (1992) 31-2, had declared that the assertion of sovereignty was not justiciable in a municipal court. The last two cases are discussed in *Chapter One*. *NSW v Commonwealth* (1975) is cited as authority for non-justiciability of sovereignty in subsequent decisions, but is beyond the scope of this enquiry as it pertains to the extension of national maritime boundaries.

sustained ‘within’ juridical orders that are apparently ‘postcolonial’⁵ and post-racist? In this thesis I argue that this contradiction is sustained through a conception of sovereignty as at once finite *and* infinite (in-finite). The thesis elaborates how this ambivalent ‘position’ of sovereignty in relation to law is sustained through the juridical limits of ‘political community’. Another crucial example should amply set the scene of this enquiry.

In 1992 the High Court of Australia in *Mabo v Queensland (No 2)* (hereafter, ‘*Mabo*’) recognised for the first time since the imperial occupation and usurpation of Aboriginal lands by the British Crown in 1788, that Aboriginal and Torres Strait Islander peoples’ antecedent property rights, or ‘native title’, survived the colonial acquisition of sovereignty. This decision gave an account of the basis for the British Crown’s acquisition of sovereignty over Australia, the reception of the common law of England in Australia, and its consequences for the proprietary rights of its indigenous people.⁶ The colonial acquisition of sovereignty was based on the “barbarian theory” – the notion that the territory was acquired by the British Crown, and the common law of England became the ‘law of the land’, because the natives were ‘barbarous and without a settled law’ (*Mabo*, 36-9). In 1992 the common law was ‘adjusted’ in order to recognise the antecedent property rights of the indigenous

⁵ ‘Postcolonial’ connotes social movements and literary, political, and juridical theories which inform and seek to challenge the terms, discourses and practices through which de-colonisation has taken place. ‘Postcolonial’ also implies an attempt to confront and (purportedly) correct a colonial ‘past’. However, ‘postcolonial’ is not simply a reference to a temporal, teleological progression from the ‘colonial’ era. My argument suggests that ‘postcolonial’ always involves a movement from the ‘past’ to a future that is always yet to arrive. The complicity of colonised elites, rebellion of colonised peoples, hybrid identities, diasporic reflections on the experience of leaving colonised societies, and ongoing engagements with the insidious formations of neo-colonialism are just some of the range of political positions invoked by the term ‘postcolonial’. For a useful discussion of the term ‘post-colonial’, see Ashcroft, 2001, 7-13; and Lazarus, 2001 and 2004. I have consistently used the term ‘postcolonial’ in this thesis without wishing to distinguish it from ‘post-colonial’. I will continue to use the former. Unless otherwise indicated, in this enquiry ‘postcolonial’ usually refers to the attempt to disavow the imperial past. I will shortly point out that this is not a linear process.

⁶ The principal judgement is that of Brennan J, and is discussed at length in *Chapter One*.

people. The *Mabo* decision is regarded as the ‘event’ of ‘postcolonial’ sovereignty in Australia, and the moment in which liberal legal institutions were renewed: “Writing that the common law was shamed by its racist history and the gaze of the international community, the justices took the occasion to alter fundamentally the conditions of Australian sovereignty” (Povinelli, 2002, 158). How could the conditions of sovereignty have been altered when judges have steadfastly refused to admit that the validity of sovereignty is a cognisable question? How is a colonial ‘past’ re-conditioned to produce a ‘postcolonial’ future? How is imperial sovereignty positioned and de-positioned by a juridical order? In this thesis I argue that these questions should be addressed as the problem of the ‘limit’ that separates sovereignty and law.

Sovereignty is a problem of the ‘limit’ to the extent that courts must articulate how a past ‘event’, such as the assertion of colonial sovereignty, can be delimited so that it can be grasped and disavowed. This requires that the sovereign assertion be rendered ‘finite’. At the same time, colonial sovereignty must also be preserved as the ‘infinite’ ground which traverses the past, present and future of law and society.⁷ Drawing from the rich vein of Australian ‘postcolonial’ law as an exemplary instance of the problem that is taken up for investigation, in *Chapter One* I elaborate how sovereignty is treated as at once ‘finite’ and ‘infinite’ (*‘in-finite’*) in the ‘postcolonial’ context of Australia. The overall objective in the thesis is to articulate the relationship between (imperial) sovereignty and law. The notion of ‘in-finite’ sovereignty neatly

⁷ The positivist approach to this problem asks whether sovereignty is ‘limited’ or ‘unlimited’ (Malbon, 2003, 323-31). Malbon investigates whether the sovereign has a limited or unlimited power to extinguish native title in Australia. Deploying Karl Popper, he considers whether to adopt an ‘essentialist’ or ‘nominalist’ approach to whether sovereignty is limited or unlimited. But neither of these approaches thinks through the question of the ‘limit’, which after all is what is at stake when it is asked whether sovereignty is ‘limited’ or ‘unlimited’.

captures the spatial aspect of imperial sovereignty (the usurpation of territory and the creation of a delimited nation state), and the temporal aspect of inaugurating 'postcolonial' law by preserving and disavowing this sovereign 'event'. As we will see in the course of the discussion, sovereignty as finite and/or infinite is a common conceptual feature of numerous approaches to the character of imperial sovereignty.⁸

Methodology

As I have just demonstrated, the ambivalent 'position' of sovereignty (its finite and infinite character) is identified in the texts of Australian 'postcolonial' law, and from them I extract a more general problem for examination (the 'limit' that sustains the separation between sovereignty and law). These cases are examples of what Fitzpatrick called the "telling instance" of a situation in which is embedded a "reiterative concern of the modern period" (Fitzpatrick, 2001a, 4). The identification of the contradictory lineaments (both finite and infinite) of sovereignty in Australian 'postcolonial' law signals and amplifies a problem that is of wider concern in accounts of modern law.⁹ An imperial sovereign assertion is the factual instance that grounds the juridical order, yet at the same time, it is always an inadequate normative

⁸ Hardt and Negri's account of 'Empire' illustrates what I mean. Though I do not accept the conclusion they reach, the account they give attributes 'finite' and 'infinite' qualities to sovereignty. For instance, they chart a movement from 'old' imperialism, where the imperial sovereign was based in the nation-state, to a new form of sovereignty they call 'Empire', where imperial sovereignty has a totalising, worldwide (that is, spatially and temporally infinite) reach (Hardt and Negri, 2000 and 2004).

⁹ This wider concern is illustrated in the theoretical engagements with sovereignty that I draw upon in the course of the discussion. For instance, there is a renewed interest in the theoretical jurisprudence of Carl Schmitt, the 'theorist of the exception', or in my terms, the theorist of the 'limit' between sovereignty and law (Schmitt, 1922/1985, and 1932/1996; for contemporary treatments of this questioning see Derrida, 1997, Ch 5-6; Agamben 1998 and 2005; Mouffe (ed.) (1999); Nancy, 2000c; and Rasch, 2004, Ch. 1-2). I discuss Schmitt's thought in *Chapter Three*. The renewed interest in Schmitt demonstrates that the 'finitude' of sovereignty is a persistent concern of political philosophers and jurists. A novel and contemporary 'telling situation' sharpens the significance of treating much older and persistent juridical concerns. I have thus posed the question of the 'finitude' or 'limit' of sovereignty in the Australian 'postcolonial' context, but extended the concern to other persistent and related questions such as the limits of 'political community' and 'jurisdiction'.

base for future law and society. As Fitzpatrick put it, these telling situations combine the “evidentiary with authoritative assertion” (ibid). The authority that is supposed to be revealed by the High Court recounting the imperial assertion of sovereignty in the Australian ‘postcolonial’ setting is found, in my account, to be lacking any of the certainty that such a (sovereign) foundation would want to disclose. But this lack of certainty, revealed here through the tension identified between finite and infinite sovereignty in the Australian ‘postcolonial’ context, proves to be very useful for examining the wider question of the relationship between sovereignty and law. Let me elaborate how this approach is brought to bear on the empirical material I examine, and how the wider theoretical concerns are brought forth. The strategy can conveniently be set out along with the contents of each Chapter.

Outline of Chapters

I describe how the Australian courts have dealt with the colonial acquisition of sovereignty in *Chapter One*. This principally involves identifying how sovereignty is at once positioned ‘outside’ law, but also preserved as the infinite ground of present and future law and society. A more general question about the ‘limit’ between sovereignty and law is then extracted from the court decisions that have dealt with imperial sovereignty. The persistent or ‘reiterative’ concern of modern sovereignty is identified by deploying the concept of ‘finitude’.¹⁰ ‘Finitude’ aptly captures the problem of delimiting (imperial) sovereignty. The relationship between sovereignty and law, I assert, discloses a problem of ‘finitude’, one that is of wider significance to theoretical discourses on sovereignty. I draw principally on the thought of Jean-Luc

¹⁰ I will shortly explain why Jean-Luc Nancy’s post-Heideggerian treatment of ‘finitude’ is the central prism through which I examine the relationship between sovereignty and law.

Nancy in order to explain how the question of the limit between sovereignty and law can be dealt with as a problem of 'finitude'. By identifying the contradictory lineaments (at once finite and infinite) of sovereignty - a phenomenon which is supposed to be stable, grounding, and beyond question - I have extracted a problematic that can stimulate a wider discussion about sovereignty. Empirical material in the form of judicial decisions pertaining to the question of (imperial) sovereignty is examined in order to identify the tensions and contradictions which reveal that the 'presence' of sovereignty is unstable. Sovereignty as at once 'finite' and 'infinite', for instance, expresses the spatial and temporal instability and indeterminacy of sovereignty.

In *Chapter Two* I consider how, despite the im-possibility of allocating a secure 'presence' to sovereignty, it is an 'event' regularly deployed in judicial accounts as a 'monistic' phenomenon that is the 'Subject' and the 'Symbol' of a unified 'political community'. I argue that such 'monistic' sovereignty is sustained by some *other* 'essence' – a point I make by considering how Australian cases give an account of the 'political community' of the 'nation' united by one Sovereignty and one 'law of the land'. Australian courts after *Mabo* have determined whether indigenous communities are 'native-enough' to be granted the belated recognition of their property rights by the 'postcolonial' juridical order (*Yorta Yorta v Victoria* (1998) and (2002)). These cases disclose that when courts delimit the position apart (from law) of sovereignty, they do so by claiming that sovereign power re-presents a unitary idea of the 'political', or that the 'nation state' re-presents a juridical construct whose stability cannot be disrupted by admitting other (customary) normative orders that sustain community. The re-presentation of ('stable') sovereignty through the

‘political’, the space of ‘being-in-common’¹¹, sustains the otherwise nebulous phenomenon of sovereignty. Sovereignty, I will argue, is content-less, but nonetheless reiterated by law through the idea that sovereignty symbolises a ‘political community’.¹² I introduce this argument in *Chapter Two* by examining how Australian courts express monistic sovereignty through a unified ‘political community’ with one ‘law of the land’. One ‘law of the land’ is sustained through the phenomenon of ‘jurisdiction’. ‘Jurisdiction’, I argue, manifests, and indeed is the carrier of, the co-presence of sovereignty, law and the political.

The co-presence of sovereignty, law and the political proposed in *Chapter Two* cannot be fully explored or developed with reference only to the material drawn from the Australian ‘postcolonial’ context. For this reason *Chapter Three* engages with the U.S Courts’ decisions on whether to grant the writ of *habeas corpus* to those indefinitely detained at the whim of the U.S Government in Guantanamo Bay. Although the ‘war on terror’ is a context seemingly different from ‘postcolonial’ Australia, it reveals the pervasiveness of in-finite sovereignty. U.S. Courts, in deciding whether to grant the writ of *habeas corpus*, inscribe the in-finite position of the sovereign by determining the limits of jurisdiction. In-finite sovereignty is sustained by law ‘positioning’ sovereignty/law with regard to the stability of political community. The analysis of these *habeas* cases demonstrates the wider significance of the argument developed in this thesis – that the contradictory lineaments of in-finite sovereignty are sustained through law’s re-positioning of sovereignty with reference to the political.

¹¹ A phrase which I elaborate through Nancy in *Chapter One* and *Chapter Two*.

¹² I will shortly provide a further account of why the ‘political’ is central to understanding the relationship between sovereignty and law. As my justification for dealing with the ‘political’ is largely influenced by Jean-Luc Nancy, I shall elaborate the significance of the ‘political’ when I explain why this enquiry is principally informed by his thought.

Chapter Three thus serves two principal functions. It continues the elaboration of how the position of sovereignty in relation to law is determined in and through the limits of 'political community'. But it also demonstrates the wider significance of my account of sovereignty developed with reference to 'postcolonial' Australia, but now with reference to what Derek Gregory has called the "colonial present" (Gregory, 2004). The *habeas corpus* cases in relation to those detained in the U.S Naval Base at Guantanamo Bay are an apt choice for considering the link between sovereignty, law and 'political community' for several reasons. The detainees were captured during the 'war on terror'. Like previous imperial adventures this war is undertaken in the name of 'civilisation' and against 'barbarians' (Ignatieff, 2003b, 3, 21; for a critique see Gregory, 2004, 251). The 'barbarian' foe is once again racialised – the 'Arab' or more widely, the 'rigid', 'frozen' Muslim fundamentalist, who seeks to destroy that other chimera of colonialism, the 'West'. The treatment of the *habeas corpus* cases that pertain to the detainees in Guantanamo Bay, despite their seeming disparity to the 'postcolonial' context, dramatically indicates how the in-finitude of sovereignty is not confined to 'postcolonial' law and society. The problem of the in-finitude of sovereignty is of more general significance, and the treatment of these *habeas corpus* cases is the 'hinge' by which this enquiry opens towards a wider treatment of the problem of sovereignty in neo-imperial settings. In both the Australian 'postcolonial' context and the U.S courts' decisions on their jurisdiction in relation to Guantanamo Bay, a 'law of the land', a law of community and 'nation', is invoked in order to set the 'limit' between sovereignty and law. It is the stability of 'nation' (in *Mabo* (No 2)) or the concerns of 'national security' (in relation to the 'war on terror') that are regularly deployed to sustain a

‘limit’ between sovereignty and law. To repeat, the tension between finite and infinite sovereignty is sustained by courts articulating the ‘limits’ of political community, usually in the form of the nation-state. However, contemporary discourses on sovereignty claim that sovereignty and political community have now surpassed being delimited by the nation-state. Rather than delimited sovereignty and political community in the form of the nation-state, it is suggested that a new juridical category of ‘Empire’ and community as the ‘multitude’ is emerging (Hardt and Negri, 2000 and 2004). Sovereign authority, it is claimed, is becoming ‘worldwide’. Is sovereignty no longer in-finite? Has sovereignty become infinite?

In *Chapter Four*, then, the analytic of in-finite sovereignty developed in the three preceding Chapters will be brought to bear on contemporary accounts of sovereignty purportedly becoming ‘worldwide’ in an era of ‘globalised’ sovereign authority (e.g. Nancy, 1997; Hardt and Negri, 2000, and 2004).¹³ The treatment of sovereignty in the first three Chapters is confined to ‘national’ sovereignty and law. But there is a proliferation of claims that sovereignty is surpassing its erstwhile delimitation within a particular nation-state and is taking form as ‘worldwide authority’ in an era of ‘globalisation’. Hardt and Negri’s account of the sovereignty of ‘Empire’ is selected for close scrutiny precisely because their claims about imperial and ‘postcolonial’ sovereignty are the opposite of what I argue throughout the thesis. My argument is that the finitude of sovereignty, like the finitude of being, can only ‘be’ through the ‘sharing’ and crossing of ‘limits’ that sustain but also always exceed sovereignty.¹⁴ The ‘event’ of sovereignty is an endless process of being-delimited in relation to law and with respect to a particular ‘political community’ – an *infinite*

¹³ There is a substantial difference between Nancy’s and Hardt and Negri’s treatment of this issue. I elaborate this difference at length in *Chapter Four*.

¹⁴ I will shortly elaborate how this argument is derived from Jean-Luc Nancy’s thought.

experience of *finite* sovereignty. Reducing Hardt and Negri's argument to the terms of my enquiry for the time being, their assertion is that sovereignty is no longer 'finite' – that is, associated with territory, 'people', 'nation', coloniser, the Occident or the state. On their account, the sovereignty of the nation-state is coming to an end. Instead of discrete sovereign entities which re-present a particular political community and its law, Hardt and Negri herald an *infinite* form of sovereignty called 'Empire'.

The second reason for considering sovereignty as 'Empire' in *Chapter Four* is in order to treat it as a point of departure for stressing the im-possibility of 'globalised' imperial sovereignty. For Nancy, 'community' should not be delimited by the being-in-common re-presented through sovereignty. Sovereignty should instead be 'Nothing', a 'non-place' (Nancy, 2000c, 139; and generally 2000b).¹⁵ Is 'worldwide' authority an instance of the 'end of sovereignty' or sovereignty as 'Nothing'? Hardt and Negri announce the end of the sovereignty of the nation-state, only to herald the emergence of a new 'global' mode of sovereignty they call 'Empire'. Empire encompasses all modes of social, economic and political being – sovereign power expands its boundaries to "envelop the entire globe" (Hardt and Negri, 2000, 189). What is proclaimed as a 'new' imperial logic of global rule has implications for enterprises which seek a 'postcolonial' or anti-imperial juridical order. As Hardt and Negri claim that the "end of history" has ushered in "the reign of peace", and that imperial, inter-imperial and anti-imperialist wars are over (ibid), it is apt to question what bearing these claims may have on 'postcolonial' and anti-imperial enterprises that are concerned with resisting ongoing and ever-present forms

¹⁵ I discuss what it means for sovereignty to be 'Nothing' in *Chapter One* and in *Chapter Four*.

of imperial domination. This questioning will return us to the problem posed at the beginning of the enquiry – how might the ‘position’ of sovereignty in relation to law be conceived in order that it facilitates a ‘postcolonial’ and anti-imperial enterprise. At the conclusion of *Chapter Four*, then, I return to address how an account of infinite sovereignty can inform ‘postcolonial’ and anti-imperial political and juridical enterprises.

Jean-Luc Nancy and the ‘Finitude’ of Sovereignty

As indicated earlier, the problem of the ‘limit’ between sovereignty and law will be addressed in this enquiry through Jean-Luc Nancy’s critique of ‘finitude’.¹⁶ Indeed, this enquiry is primarily informed by Nancy’s politico-philosophical thought. I should thus explain, by way of introduction, why the notion of the ‘limit’ or ‘finitude’ is a productive means of addressing the relationship between sovereignty and law and why Nancy’s thinking has informed the enquiry. The problem of the limit which separates sovereignty from law has purchase in many contexts including the ‘postcolonial’. The general question is often posed in terms which ask whether sovereignty is limited or beyond limit – as if the limited and illimitable have a secure ‘presence’ which can be conceptually or empirically grasped.¹⁷ Rather than ask whether sovereignty is limited or beyond limit, the question I attempt to address is the nature of the ‘limit’. Does a ‘limit’ absolutely separate what is enclosed? What account can be given of what is adjacent to the conceptual (and cultural, national, communal, legal etc.) border of sovereignty? These are all different ways of asking

¹⁶ An extensive account of Nancy’s critique of finitude and other salient aspects of his thought is given in *Chapter One*.

¹⁷ This is often the approach of international relations theory and is discussed through the work of Bartelson (1995) in *Chapter One*.

the same question – what account can be given of a delimited ‘position’ and the ‘relation’ *with* whatever inevitably lies beyond this position? For my purposes this line of questioning enables me to address the purported position of sovereignty beyond law. Examining these questions is the task which, as the title of the thesis indicates, I have termed ‘*de-positioning*’ sovereignty.

Throughout this thesis I deploy Nancy’s critique of the finitude of being. Being is finite. The existence of an individual being begins at birth and ends at death, and yet, knowledge of finitude is not derived from a being experiencing her own birth or death. The problem of finitude is a problem of metaphysics.¹⁸ The metaphysical question taken up by Nancy, after and beyond Heidegger, is the extent to which the ‘subject’, the ‘I’ or ‘singular being’, is exceeded by its metaphysical re-presentation as a ‘subject’. The individual being, Nancy argues, experiences its finitude by being in community: “Death is indissociable from community, for it is through death that the community reveals itself – and reciprocally” (Nancy, 1991, 14). The ‘reciprocal’ revelation of the death of the finite being through community, and community through this death, places the singular being indissociably in relation. It is only by observing the finitude of another – the death of another being – that a singular being can have knowledge of her own finitude. This account of finitude stresses the impossibility of a position absolutely apart, or a ‘limit’ which absolutely separates ‘inside’ from ‘outside’. Position (always) implies relation. In this thesis I bring this thinking to bear on the being of sovereignty, and on the relation between sovereignty and law. For instance, where courts assert that sovereignty is ‘finite’ or ‘infinite’ – e.g. sovereignty as absolutely beyond law, capable of being grasped as a discrete

¹⁸ It is beyond the scope of my enquiry to chart the development of this problem in the history of metaphysical thought. However, I will shortly explain why the thought of Jean-Luc Nancy, in particular his critique of finitude, informs all aspects of my argument.

entity in order that it can be disavowed, or as all encompassing, transcending space and time - Nancy's critique of finitude enables one to question the possibility of such in-finitude. When courts position sovereignty outside law, I question how such separation, such being-apart, is sustained.

There is another significant aspect of Nancy's thinking which I draw on in this thesis. That is his thought of 'community' which is central to his critique of finitude. Nancy develops his critical engagement with community along with his account of the im-possibility of a singular being. A singular being exceeds the metaphysical characterisation of being as a 'subject' precisely because of the 'excess' (death) that marks the finitude of being – that is, the subject cannot say that it is dead, she cannot announce her death, even though this death most properly belongs to her (Nancy, 1991, 14). Thus characterising being as a 'subject' (the metaphysical treatment of being) does not say nearly enough about this being's existence. Departing from Heidegger's emphasis on *dasein* (the German noun for existence), Nancy emphasises the importance of examining *mitsein* (or being-with) (Nancy, *ibid*).¹⁹ The finitude of being cannot be grasped other than in community. It is only by being-with others that 'we' can have knowledge of our own death (Nancy, *ibid*, 14-15). This emphasis on 'relation', being-in-common, as a condition of ascertaining 'position', is central to the argument I develop in order to give an account of the 'limit' that separates sovereignty and law. Moreover, I draw on Nancy's critique of any essential basis for community in interrogating 'nation', 'tradition', 'native', or a notion of the 'civilised', all of which arise in the 'postcolonial' or neo-imperial contexts examined.

¹⁹ It is beyond the scope of my enquiry to provide an account of Heidegger's critique of metaphysics.

I should stress that my treatment of sovereignty through Nancy's critique of the finitude of being or account of community is not a novel extension of his thought. Nancy has extended his critique of finitude to the problem of the relation between sovereignty and law (see Nancy, 1991 and 2000c discussed at length below). Moreover he brings the critique of finitude to bear on postcolonial studies (see Nancy, 2003d) and on the question of sovereignty in an era of 'globalisation' (see Nancy, 1997, 2003e and 2003f – discussed in *Chapter Four*). All these aspects of Nancy's thought are considered and developed in the course of the discussion.²⁰

Nancy's thinking on community also provoked attention to a matter that I signalled earlier – the importance of 'political community' for understanding the relationship between sovereignty and law. Permit me, then, to say a little more about why I argue that the notion of the 'political' is so central to understanding the relationship between sovereignty and law. The question of the 'political', as with sovereignty, is a problem of the 'limit'. My argument is influenced by Lacoue-Labarthe and Nancy's account of how the 'political' is a problematic constituted by the concepts of 'people' and 'sovereignty' (Lacoue-Labarthe and Nancy, 1996, 115-116).²¹ 'People' and 'sovereignty' are staged as a closure (ibid). 'People' and 'sovereignty' are thus questions of the 'limit'. The closure is determined by a 'measure' for membership of 'people', for instance, as 'race', 'traditional native', 'ethnos', 'civilised' and so on. All these closures that sustain the 'political' as 'people' or community feature in the postcolonial and neo-imperial contexts in which

²⁰ I should stress at the outset that as my account of sovereignty develops in the course of the discussion, there is a degree of repetition of Nancy's critique of finitude. While the exposition of the central tenets of Nancy's critique of finitude is set out in *Chapter One*, related aspects of his thought (e.g on community, jurisdiction, 'sense' of the 'world') are developed in subsequent Chapters.

²¹ I provide a more detailed account of their thought on this question in *Chapter Two* and develop it further in *Chapter Three*.

I examine the problem of in-finite sovereignty. Indeed it could be said that the political occupies a place in-between sovereignty and law. Sovereignty is (sometimes) a symbol of this essential basis for community as 'people' or 'nation'. The closure on community, for instance, in a 'traditional' indigenous community, is resolved by some 'essence'. While the 'in-finitude' of sovereignty renders sovereignty unstable and indeterminate, the 'essence' by which 'political community' is delimited offers an(other) basis by which sovereignty can be given some substantial content or be delimited in space/time. This account of the significance of 'political community' for articulating the 'position' of sovereignty is consistent with influential accounts of the relationship between sovereignty and the political.²² My intervention is to explain how a sovereign exclusion, by an essence as 'measure' for membership in community, or the decision on the enemy, does not render the excluded entirely apart, but rather, sustains a 'relation' that constitutes the position of sovereignty in relation to law.²³

Some crucial caveats before proceeding. This thesis should not be read as providing an exhaustive history of the relation between imperial sovereignty and law. The contexts examined are necessarily limited – and in the opening section of *Chapter One* I will explain why the Australian 'postcolonial' context is the 'telling instance' which so aptly poses the problematic investigated here. Where comparisons are made, for instance with 'postcolonial' Canada in *Chapter Two*, the extent of the comparison is limited to what is necessary to support the argument being developed.

²² Carl Schmitt, for instance, explained how the central sovereign decision of juridical and political importance – indeed the decision that identified the sovereign qua sovereign – was the decision on friend/enemy, the decision on the 'political' (see Schmitt, 1996, discussed in *Chapter Three*).

²³ I make this argument about the political in *Chapter Three* through Nancy's and Agamben's treatment of the ambivalent position of 'abandoned being' both inside/outside the juridical and political order, see Nancy, 1993b, and Agamben, 1998.

The thesis does not seek to rehearse the extensive literature in political philosophy or international relations that have dealt with the nature of sovereignty or its relation to law. That is not to say that this study does not have implications for understanding sovereignty in those fields of enquiry – but I have not sought to foreground or develop the connections here.²⁴ The problem of sovereignty dealt with here is principally of an imperial variety. Characterising sovereignty as in-finite, both finite and infinite, does suggest that sovereignty is both contained and illimitable. It is this impossibility of sovereignty that the enquiry seeks to chart. By examining the impossibility of ‘postcolonial’ sovereignty, it is hoped that this study will contribute to a growing literature in ‘postcolonial’ theory and law. The intention is to offer an account of sovereignty that resists the pragmatic, utilitarian, and state-centred compromise that courts reach when they account for the relation of law to imperial sovereignty. The compromise manifests the failure of ‘postcoloniality’. However, what is revealed from within the texts of law is that the terms of the failure – the impossibility of a simultaneous disavowal and preservation of an excessive sovereign power, is indeed the ‘event’ of ‘postcolonial’ sovereignty. This *im-possible* ‘event’ unravels in and through law.²⁵

²⁴ The critical engagement with Bartelson, 1995, in *Chapter One*, and Hardt and Negri, 2000 and 2004, and Simpson, 2004, in *Chapter Four*, serves to highlight the significance of my analysis for debates about sovereignty in political philosophy, and international relations theory.

²⁵ Before proceeding, it is worth clarifying what is signified by the ‘*im-possibility*’ of sovereignty. The ‘im-possibility’ of sovereignty refers to the character of sovereignty as both delimited *and* illimitable, finite *and* infinite. Sovereignty is thus an ‘event’ that does not have a ‘presence’ as such. This impossibility of sovereignty is disclosed, I will argue, through a variety of instances of its in-finitude which will be elaborated below.

CHAPTER 1

De-Positioning Sovereignty

Boundaries are central to the discourse of sovereignty. It is not merely a case of physical boundaries ... but of cultural boundaries which separate the 'same' from the 'other', and of conceptual boundaries which distinguish the domestic from the international, community from anarchy, and the universal from the particular. ... Outside these boundaries there exists no order, no community, no framework for conducting normative discourse.

Camilleri and Falk (1992), *The End of Sovereignty?*, 237-8.

... [S]overeignty stands as the representation of the autonomy of the political. By drawing on an intrinsically collective notion of political power – what Arendt referred to as 'the worldly in-between space by which men are mutually related' – sovereignty can be recognised to be a relational phenomenon.

Loughlin (2003), "Ten Tenets of Sovereignty" in Walker (ed.), *Sovereignty in Transition*, 80.

... [S]overeignty and community can be the mere outline of an area of shared jurisdiction, or else they can identify themselves as the subject of a fundamental legitimacy. In the first case, sovereignty and community tend to be nothing – to repeat once again the formula that George Bataille exhausted himself in thinking through, "Sovereignty is NOTHING". ... In the second case, they are not merely something but the *res cogitans* of a subject effecting in person the autoteleology of its substance (whether this person be the people, the leader, the fatherland, the class, or the individual, as long as it is "consciousness" or "spirit").

Nancy (1997), *The Sense of the World*, 107.

A range of legal and politico-philosophical discourses characterise sovereignty as a phenomenon with a spatial and temporal 'limit'. Physical, cultural and conceptual 'boundaries' and 'limits' seem central to characterisations of sovereignty (see epigraph from Camilleri and Falk). Sovereignty is at once discrete or delimited and also a 'relational phenomenon' (see epigraph from Loughlin). On the other hand, sovereignty, in its classic instantiation, is also 'without limit' – the supreme power with nothing above or beyond it. Sovereignty represents the 'autonomy' of the political (see epigraph from Loughlin). These various discourses elaborate the 'position' of sovereignty in time and space. The metaphor of inside/outside space and time asserts a territorially and historically graspable 'presence' that can be attributed

to sovereignty.²⁶ Sovereignty is thus many things, but always imbued with a delimited 'presence' and 'position'. In this Chapter I call into the question a discrete 'presence' and 'position' attributable to sovereignty. I argue that sovereignty is not discrete or 'finite'. Nor is it possible to claim, I argue, that sovereignty is an 'infinite' totality with nothing beyond it. Interrogating the problem of limits, finitude, 'presence' and relation must itself be contained in order to avoid the illimitability of such abstractions. Therefore, this Chapter interrogates the 'finite' and 'infinite' quality attributed to sovereignty by examining the attempt to inaugurate a 'postcolonial' law and society in Australia.

In the Australian 'postcolonial' context, the colonial sovereign 'event' that founded the colony and established its juridical order is both preserved and disavowed. In order to preserve the sovereign 'event' it is given an 'infinite' quality whereby sovereignty is ungraspable, beyond limit (non-justiciable). However, in order to distinguish the 'postcolonial' legal order from its foundation in a sovereign assertion that regarded indigenous people as 'barbarous' and 'without a settled law', the present common law needs to assert that the foundation can be adjusted or 'shifted'. Australian 'postcolonial' law, in its belated recognition of indigenous rights and interests in land, thus provides the opportunity to examine the contradictory lineaments of finitude and infinity attributed to sovereignty.

²⁶ For a thorough critique of this metaphor of inside/outside in relation to sovereignty, see R.B.J Walker, 1993, Ch.8.

Over the past several decades indigenous people in settler-colonies such as Australia have obtained legal recognition of their proprietary rights in land.²⁷ In the case of Australia the recognition of indigenous rights in land took place after two centuries of courts refusing to acknowledge the proprietary and other interests that indigenous people hold in relation to land. The *Mabo* decision is commonly regarded as a retreat from the racist assumption that Australia was a vacant land or *terra nullius*.²⁸ The Australian High Court's recognition that indigenous peoples held proprietary interests in land ('native title') was touted as the full recognition of their humanity, and was heralded as a retreat from legally endorsed practices of marginalisation which were central to the establishment of British colonies in Australia.²⁹ However, the recognition of indigenous property rights has been subordinated to the sovereign act which founded a colony. The foundation of a colony and its juridical order have been characterised as sovereign 'acts of state' (*Mabo*, 31).³⁰ These sovereign acts are declared to be non-justiciable in municipal courts. Recognition of 'native title' is also subordinated to subsequent 'acts of state', the sovereign acts of the respective Parliaments of the Colonies (later states of the Commonwealth of Australia) which issued tenures and thus alienated the land appropriated from indigenous people.

At stake in *Mabo* was a 'de-positioning' of sovereignty in order to inaugurate a 'postcolonial' law and society. It thus offers an exemplary opportunity to examine

²⁷ In this study I focus on indigenous land rights claims in Australia, with some limited comparisons with Canada. The landmark decision of the Australian High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (hereafter *Mabo*) is discussed at length in this thesis. In this decision the reasons for judgement of Brennan J is commonly regarded as the leading judgment.

²⁸ For a sample of commentaries which treat *Mabo* as a recognition of 'difference', see: Detmold, 1995; Patton, 1995 and 1997; Webber, 1995.

²⁹ For a critique of the limits of this form of recognition, see Motha, 1998.

³⁰ For a historical account of the foundation of the colony, see Castles, 1982; and Neal, 1991.

the relationship between sovereignty and law. The recognition of native title rights is legitimated on the basis that it is consistent with the emergence of pluralist, multicultural, cosmopolitan societies that embrace 'universal human rights' as their core values. But the renewal of legal institutions, the production of a 'post-racist' and 'postcolonial' future, is the instance of a certain remembering of the 'past'. Law's response to the legacy of the colonial conquest of territory, dispossession of land and destruction of indigenous forms of social organisation, recalls colonial sovereignty and requires the re-positioning of this sovereign 'event' as the condition for inaugurating a 'postcolonial', 'post racist' law and society. Recalling the 'event' of sovereignty as something that took place "back then" raises the question of the 'graspability' of such an 'event'. What is the nature of this sovereign 'event' and what is law's relationship to it? Does this sovereign 'event' have a 'presence' that can be preserved or disavowed? These are questions I wish to pose as the very possibility of a *finite sovereignty* (delimited and graspable). Such a delimited phenomenon is asserted when sovereignty is retained as foundation, 'positioned' in the 'past', and disavowed as inconsistent with a 'post-racist' and 'post-colonial' law and society.

My argument will proceed as follows. I will extract the problematic of a monistic or finite sovereignty through the exemplary instance of the attempt by the Australian High Court to inaugurate postcolonial law and society in Australia. I will demonstrate how *Mabo* invoked a contradictory conception of sovereignty as both 'finite' and 'infinite' as the condition for inaugurating a 'postcolonial' law and society. I will then argue, through the thought of Jean-Luc Nancy, that such finitude/infinity is impossible. But this impossibility is productive. The impossibility

of finite/infinite sovereignty exposes a relation. This exposure is the occasion of community.

Through a discussion of the impossibility of finite/infinite sovereignty in the exemplary instance of *Mabo*, I wish to derive a more generalisable account of the relation between sovereignty and law that can be brought to bear on other contexts where the relationship between sovereignty and law is being considered – where sovereignty is being consigned, distributed or re-positioned. For instance, the spatialised ‘position’ of sovereignty in ‘relation’ to law and territory is precisely what is at stake when U.S Federal Courts debate the availability of the writ of *habeas corpus* to those being detained in Guantanamo Bay, Cuba. A discussion of sovereignty and law in the ‘postcolonial’ context of Australia will elicit a more general problematic of the ‘position’ of sovereignty in ‘relation’ to law.

1.1 Finite Sovereignty and the ‘Postcolonial’ Nation

A brief account of the legal history that conditioned the ‘postcolonial’ setting in which *Mabo* was decided is an apt place to begin. I will focus on how British sovereignty was asserted over indigenous lands, and on how Australian courts dealt with this colonial legacy prior to *Mabo*. The bulk of the treatment of sovereignty that follows thereafter will be centred on the decision in *Mabo*. We will see that the basic problem has been one of preserving Australian law’s foundation in the British colonial assertion of sovereignty, distinguishing the sovereign ‘nation’ and its law

which emerged after Federation in 1900, and cleansing what is now asserted to be a 'postcolonial' law and society from its colonial juridical antecedents.³¹

1.1.1 Colonial Sovereignty of a 'Postcolonial' Nation

British sovereignty over Australia was first asserted during the voyage of Captain Cook along its east coast in 1770. As we will see, many attempts were made to inaugurate British colonial sovereignty. As the indigenous peoples of Australia were regarded as not being in possession of the land they occupied, Cook asserted control (*imperium*) and possession (*dominium*) of the territory on behalf of the British Crown. Ceremonies of affirmation and reaffirmation were performed to 'seal' discovery and settlement (see generally, Seed, 1995). While in Botany Bay, on the east coast, Cook's expedition had "cut an inscription into a tree recording the details of the arrival of the ship" (Castles, 1982, 22). Presumably because solemnity and permanence were lacking in this original inscription, on 22 August 1770, Cook performed the appropriate forms for taking possession of an 'uninhabited land' on an island he perspicaciously named Possession Island (*ibid*). As Cook's Official Log records: "At six possession was taken of this country in his Majesty's name and under his colours, fired several volleys of small arms on the occasion, and cheer'd three times, which was answered from the ship" (*ibid*). Cook's ceremonies, it seems, were lacking. On the arrival of the First Fleet of convicts and gaolers in Port Jackson on

³¹ The amalgamation of the Australian colonies to constitute a Federated nation was enabled by the *The Commonwealth of Australia Constitution Act 1900* (Imp.) passed by the Parliament of the United Kingdom. The *Constitution of Australia* was a creature of this imperial statute. The emergence of an Australian nation was, even after colonisation, well and truly tied to British juridical institutions. It was not until the *Australia Act 1986* (UK), another British Act of Parliament, and *Australia Act 1986* (Cth), that the Privy Council of the UK House of Lords ceased to be the final appellate court in the Australian juridical structure. Needless to say, the 'independence' of the Australian nation is attended by much ambivalence and ambiguity. For an incisive discussion of the origin of Australian law interrogated through the ambivalent origin of the High Court of Australia, see Dominello, 2003.

26th January 1788 more ceremony of flag unfurling and firing of arms were performed to take possession (ibid, 24). This too was not enough as a second ceremony, with more 'pomp and circumstance' took place on 7th February, 1788:

[Governor] Phillip's first Commission was read out. The Act of Parliament and the First Charter of Justice which created the first courts were broadcast to the convicts and their gaolers. This second ceremony [of 1788], like the first, was an assertion of independent British authority over New South Wales. It proclaimed, in effect, that Britain was now beginning to perfect its claim to New South Wales by occupying part of this new possession and setting up its first governmental administration. (ibid)

The multiple ceremonies evidence the precariousness of colonial sovereignty. Moreover, the initial assertion of sovereignty is not a finite 'event' that takes place 'once-and-for-all'. Colonial sovereignty remained to be perfected by occupation. This inchoate character of sovereignty is an original 'lack' that courts would later, and recurrently, seek to address.

In 1841 there was eloquent treatment of whether the law of England applied to Aboriginal people where a crime is committed by one Aboriginal upon another (*Bonjon's Case*, (1841)). The question was whether the law of the coloniser, English law, had jurisdiction with respect to intra-Aboriginal disputes. This question turned on whether the Colony of New South Wales was acquired by conquest, cession or occupancy of an uninhabited territory discovered by British subjects. The status of the colony in the eyes of the coloniser's law, as we will see, was central to determining the rights enjoyed by the indigenous population. In the eighteenth century Emer de Vattel advanced the idea that new territories could be obtained by

settlement rather than conquest if the land was not subject to cultivation, even though the territories were inhabited by people (Vattel, 1916; for discussion see Castles, 1982, 16-7). This justification for usurping inhabited territories (that the territory was uncultivated) was canvassed in *Bonjon's Case*, but it was observed that "the frequent conflicts that have occurred between the colonists and aborigines within the limits of the colony of New South Wales, make it, I think, sufficiently manifest that the aboriginal tribes are neither a conquered people, nor have tacitly acquiesced in the supremacy of the settlers" (*Bonjon's Case*, 153). This is an important case that marks an early ambivalence about whether the colony was acquired by settlement or conquest, and thus whether the coloniser's law was applicable to the indigenous population. It is a question that presents itself alongside the basis on which sovereignty is asserted, and the consequences of such an assertion for the indigenous peoples. Willis J stressed that there was no treaty or express enactment subjecting the indigenous people in the colony to English colonial law (ibid, 155). Nor should they be treated as "foreigners in a kingdom which is their own" (ibid). It could be said that this remains the high point of judicial sensitivity to the usurpation of aboriginal land and sovereignty to this day. This early equivocation did not last.

The Supreme Court of New South Wales in *The Attorney-General v Brown* (1847) considered whether land granted by the Crown was regulated by the feudal principles by which land was held in England. Land had been leased to the defendants (non-Aboriginal persons) with a reservation that no minerals such as coal, silver and gold could be mined as they were reserved to the Crown. The defendants had asserted that the Crown held no 'beneficial ownership' (*dominium*, distinct from title to territory, *imperium*) in the land. The Court held that "The territory of New

South Wales, and eventually the whole of the vast island [sic] of which it forms a part, have been taken possession of British subjects in the name of the Sovereign. They belong, therefore, to the British Crown” (*A-G v Brown* (1847) 317). As New South Wales was regarded as a “newly-discovered country, settled by British subjects” the occupancy or ‘possession’ by the Crown was said to be “no fiction” (ibid). But because the “colonists brought the common law of England with them”, it was regarded as a convenience to adopt the feudal doctrine of tenures, where all land is held of the Crown (ibid). The significance of this decision for the indigenous population was that it confirmed that they had been deprived of any rights in the land as the Crown had taken ‘possession’, it had become the ‘universal occupant’.

William Blackstone in his *Commentaries on the Laws of England* set out three modes of acquiring territory. They were through ‘conquest, secession or occupation’³² (Australian courts have tended to refer to the last category as ‘settlement’).³³ For occupation/settlement to take place, the territory would have to be *terra nullius* or vacant land.³⁴ In *Cooper v Stuart* (1889), the Privy Council confronted the fact that although Blackstone’s formula required that the Australian colonies would have to be *terra nullius* or ‘vacant land’ to be acquired by settlement, they were in fact inhabited. The Privy Council dealt with this obstacle by modifying Blackstone’s requirement. It ‘expanded’ the notion of *terra nullius* to include lands which were described as “practically unoccupied” (Simpson, 1993, 200; *Cooper v*

³² Blackstone, *Commentaries on the Laws of England* (17th Ed. 1830), Book I, Ch. 4, pp. 106-108 as cited in *Mabo*, 34-5.

³³ It is beyond the scope of my thesis to pursue these doctrines in any detail. See the discussion of William Blackstone, *Commentaries on the Laws of England* in Simpson, 1993, 199.

³⁴ For an excellent discussion of the doctrine of *terra nullius* in international law in the context of Australian colonialism, see Simpson, 1993.

Stuart, 291). This later became known as the 'enlarged notion of *terra nullius*' which, we will see below, was discussed over a century later in *Mabo*. As Simpson puts it:

In this way, the people who did inhabit the land were redefined as physically present but legally irrelevant and their history was obliterated. Thus began the series of elisions and slippages that came to characterise Australian judicial pronouncements on acquisition, and to provide the tools for a series of artificial and purely formal reconciliations of law, politics and history. (Simpson, *ibid*, 200).

Cooper v Stuart stated categorically that the Australian colonies were acquired by 'settlement' and no other means. 'Settlement' as the ground of acquisition meant that Aboriginal law and the antecedent rights determined by that law were not recognised by the coloniser.

The question of colonial acquisition and its consequences for the property rights of indigenous people was not directly addressed again until *Milirrpum v Nabalco* (1971) (the *Gove Land Rights case*).³⁵ This case had all the trappings of the large contests between indigenous communities, Governments, mining companies and other stakeholders in land which were to follow in the decade after *Mabo* (1992). There was lengthy evidence from the plaintiffs and anthropologists, evidence from Professor Berndt and Professor Stanner, to establish the Aboriginals' 'social organisation' (*Milirrpum*, (1971), 165-76). The task was to prove that contrary to

³⁵ The application was brought by the plaintiffs at a time when indigenous people throughout the world were asserting their rights, and decolonisation and self-determination had gained considerable momentum. In Australia, a referendum in 1967 had affirmed that indigenous peoples could be counted in the Census, and removed legislative authority over indigenous people from the States and granted it to the Federal Government. The Referendum is colloquially identified as the date when indigenous people were granted full rights of citizenship, though racial discrimination was not outlawed until 1975 (*Racial Discrimination Act* 1975 (Cth)), and countless social, economic and political disparities between indigenous and non-indigenous people continue to this day.

Cooper v Stuart, the territory of Australia had a ‘settled people with a settled law’ on colonisation. Blackburn J held that:

The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called “a government of laws, and not of men”, it is that shown in the evidence before me. (*Milirrpum*, 267).

One would have expected that this vital finding of fact would have consigned *Cooper v Stuart* to the abhorrent days of colonial racism. That was not to be. Rather than taking the opportunity to distinguish *Cooper v Stuart* on the facts, Blackburn concluded that the territory was a ‘settled’ colony (*Milirrpum*, 244). As a settled colony English law applied in the “whole of the colony” (*ibid*). As English law does not have a rule recognising “communal native title”, it was held that “no doctrine of communal native title” exists in Australia unless it is expressly created by statute (*ibid*). In other words, although the indigenous people were found to have a system of law which could sustain communal native title, they were found not to have any proprietary interests in the land.³⁶ In *Mabo*, as we will see, the majority came to the opposite conclusion.

The colonial acquisition of sovereignty was directly challenged in the Australian High Court in *Coe v The Commonwealth (No 1)* (1979). The plaintiff’s claimed that “there is an aboriginal nation which, before European settlement, enjoyed exclusive sovereignty” over the Australia, and which still has sovereignty (*Coe*, 407). They asserted that “Captain Cook wrongly proclaimed sovereignty and

³⁶ For a discussion and critique of *Milirrpum* see Simpson, 1993, 200-01; and Hocking, 1993, 188-9.

dominion over the east coast of Australia” (ibid). According to the plaintiffs, “Australia was acquired by the British Crown by conquest, after which the aboriginal people and nation retained their rights in respect of their lands” (ibid). Thus it was claimed that the plaintiff and the Aboriginal people are “entitled at common law to the proprietary and possessory rights which they had prior to 1770, unless those rights were taken away by ‘bilateral treaty, lawful compensation and/or lawful international intervention’” (ibid).³⁷ In the face of these claims Gibbs J (who wrote the main judgment) confidently asserted that if the plaintiff is suggesting that the “legal foundation of Australia is insecure ...it cannot be supported” (ibid, 408). Here we see explicit signs that the colonial assertion of sovereignty, despite its basis in factual errors about the character of Aboriginal society and law, is imbued with a plenitude that places it beyond reproach. This is one sign of what I will later characterise as the ‘infinite’ quality attributed to colonial sovereignty.

The plaintiff in *Coe* claimed that the Aboriginal people of Australia should be treated as a ‘domestic dependent nation’, to use the formulation by Marschall CJ in *Cherokee Nation v State of Georgia* (1831). Gibbs J refused to accept this because he claimed that the relationship between the white settlers and Aboriginal peoples in Australia was not the same as in the United States. Moreover Gibbs J claimed that it is not possible to say that the Aboriginal people of Australia are organised as “a distinct political society separated from others” (*Coe (No 1)*, 408). On the question of whether Australia had been acquired by conquest Gibbs J dismissed this proposition: “It is fundamental to our legal system that the Australian colonies became British

³⁷ There were various other claims which I have excluded given the purpose of this introductory historical account.

possessions by settlement and not by conquest” (ibid). Here then is the ‘secure foundation’ of the legal system. Gibbs J continues:

It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and *a colony acquired by settlement in a territory which by European standards, had no civilized inhabitants or settled law*. Australia has always been regarded as belonging to the latter class.(ibid, emphasis added)

Note here that the formulation in *Cooper v Stuart* (1889), that the Australian colonies were ‘practically unoccupied’, is being augmented (Simpson, 1993, 201). The fact that the territory was inhabited, that it was *not* ‘practically unoccupied’, could no longer be denied. But trusty ‘European standards’ of civilisation and ‘settled law’, nearly a century after *Cooper v Stuart*, were deployed in order to expand the range of ‘inhabited territories’ that would be regarded as *terra nullius* (ibid). *Coe v The Commonwealth* is the high point of the refusal to recognise indigenous people and the rights enjoyed under their laws.

Just over a decade later, in *Mabo*, the High Court reversed these long standing authorities in order to recognise indigenous proprietary rights in land held under their traditional laws and customs. The result in *Mabo*, as we will see, left the colonial assertion of sovereignty undisturbed. The High Court asserted that it was moving away from an ‘age of racial discrimination’. Previously unrecognised indigenous proprietary rights would henceforth be recognised by the Australian common law.

This is what makes *Mabo* a founding instant of 'postcolonial' law and society. I will go onto argue that this was only possible because sovereignty was imbued with both a 'finite' and 'infinite' quality.

In *Mabo* the High Court of Australia was asked to determine whether the annexation of the Murray Islands to the Colony of Queensland in 1879 or 1895 (the insistent sovereign event was ironically uncertain) vested absolute ownership of the land in the Crown (*Mabo*, per Brennan J, 20-1, 24-5, 30-1).³⁸ The plaintiffs, representatives of the Meriam people, claimed that the Crown acquired 'radical title' (title to the territory or *imperium*) but not 'beneficial title' to the land (possession or *dominium*) (ibid, 30).³⁹ The respondent, the State of Queensland, argued that the Crown acquired absolute beneficial ownership of the land on the assertion of sovereignty (ibid, 26). By accepting the distinction between radical title and beneficial ownership of the land, the Court confirmed the acquisition of sovereignty over the Murray Islands but recognised that a *sui generis* form of title called 'native title' was capable of recognition by the common law and was thus a burden on the radical title of the Crown. The incidence of native title would be determined by the traditional laws and customs of the indigenous community making the land claim (ibid, 58-9). Importantly, if an indigenous community lost its physical connection with the land or ceased to practice their traditional laws and customs, both questions of fact determined by the courts, native title could not be recognised: "when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared"

³⁸ Recall that *A-G v Brown* (1847) had decided that the Crown became the 'universal occupant'.

³⁹ Radical title is the term given to the sovereign's right to control a territory, distinct from its beneficial ownership of the land.

(ibid, 60). Such a determination would effectively declare the ‘non-existence’ of a particular indigenous community, or traditional law sufficient to sustain a land claim. ‘Native title’ is a mode for including the previously marginal or excluded in the ‘postcolonial’ polity of Australia. This polity now seeks to march in step with international law which, as Brennan J stressed, has “declared the existence of universal human rights” (ibid, 42). The common law needed to be adjusted because: “A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration” (ibid). But the inclusion of the ‘native’ as a ‘native’ can be refused by a Court’s declaration that indigenous law, and thus community, is no longer in existence.⁴⁰ The High Court also stated that native title was capable of being extinguished by the grant of inconsistent tenures or the Crown’s appropriation of land for its own purposes. Brennan J attributed acts of alienation and appropriation solely to the Crown exercising its “sovereign authority over land”, thus attempting to absolve the common law from any responsibility for extinguishment of native title (ibid, 68-9). The power that dispossessed indigenous people is thus an ‘exceptional’ power whose actions cannot be reviewed by a ‘postcolonial’ legal system. The dispossession of indigenous people is regarded by the Court as ‘exceptional’ to the extent that the decision to appropriate/alienate land is non-justiciable. Later I will describe how the High Court sought to free itself from being a “prisoner” of this imperial legal history (ibid, 29). But first I will describe how the attempt to relegate sovereign acts to the ‘past’, a conception of sovereignty as finite, is the ground of ‘postcolonial’ law and society.

⁴⁰ See *Yorta Yorta v Victoria* (1998), and (2002). These cases will be outlined and analysed below.

1.1.2 *The Finitude of Sovereignty in Mabo (No 2)*

There are several instances in *Mabo*⁴¹ where the inauguration of a 'postcolonial' law and society is based on a finite conception of sovereignty:

- i. Dispossessing the indigenous people of their land is attributed to an imperial sovereign. A finite conception of sovereignty enables these acts of dispossession to be relegated to a now surpassed 'colonial' era (31);
- ii. The grounds for the reception of the common law of England to Australia is a consequence of an imperial assertion of sovereignty over a territory deemed to be 'vacant land' (*terra nullius*) because its inhabitants were "barbarous" and 'low in the scale of social organisation' (38). A finite conception of sovereignty permits Australian law to *retain and depart* from this racist ground of law's reception in the territory. By regarding sovereignty as monistic, singular or finite, a legal system previously concerned with the exigencies of Empire is now able to ripen into an "Australian law" no longer under the constraints of the courts in the hierarchy of Empire (29, 34-8);
- iii. Violence accompanied the arrival of settlers and the occupation of the continent of Australia. Indigenous people were excluded and marginalised from the settler social and economic framework and in some cases eliminated through genocidal acts of violence. A finite conception of sovereignty that relegates these events to a time long 'past' enables the court to inaugurate and affirm a society which reflects 'contemporary values based on universal human rights'. Relegating violence and dispossession to a time now 'past',

⁴¹ In-text references that follow in this Chapter are to *Mabo* (1992).

the High Court affirmed the equality of all Australians by announcing that Australia is no longer “frozen in an age of racial discrimination” (41-2).

It is in these ways that a ‘*postcolonial*’ law and society relies heavily on the possibility of a ‘finite’, containable, *colonial* sovereignty. That is, a *limit* would have to separate imperial sovereignty and a nation’s law now capable of recognising the citizenship rights (as proprietors) of indigenous people. The implications of the impossibility of a ‘finite’ sovereignty that can be separated from ‘postcolonial’ law will be explored below. For now I wish to consolidate the nature of the problematic I am eliciting from *Mabo* - the impossibility of a finite conception of sovereignty. The point of this elaboration is to demonstrate, in an actual politico-juridical context, the extent to which ‘postcolonial’ law is premised on a finite conception of sovereignty. I will then take up the implications of the impossibility of such a delimited, finite sovereignty.

Mabo was an attempt to reconcile the contradictory lineaments of an imperial assertion of sovereignty over a territory regarded as inhabited by “backward” people devoid of sovereignty and law, the *consequent* reception of the common law as the ‘law of the land’, the appropriation of land, the destruction of indigenous forms of social organisation, and a ‘postcolonial’ society that (now) respects universal human rights. Let me elaborate the impossibility of such a reconciliation. A sovereign decision to annex a territory on the basis of the “enlarged notion of *terra nullius*”⁴² is

⁴² The ‘enlarged notion of *terra nullius*’ refers to the acquisition of territory of “backward peoples”, indigenous inhabitants “not organised in a society that was united permanently for political action”, *Mabo*, 31. Such territory was treated as a “desert uninhabited”, that is, *as if* it were *terra nullius*. In Australia this was only retrospectively explained through the racist notion that indigenous people were ‘too low in the scale of social organisation’, see discussion of cases in *Mabo*, 38.

recognised in *Mabo* “simply on the footing that such a prerogative act is an act of state the validity of which is not justiciable in the municipal courts” (30). Such a sovereign assertion was the basis for the reception of the common law of England in the territory of Australia:

it was necessary for the common law to prescribe a doctrine relating to the law to be applied in such colonies, for sovereignty imports supreme internal legal authority. ... The hypothesis being that there was no local law already in existence in the territory. (36)

The indigenous people were treated as if they were not sovereign over the territory, a people regarded as “barbarous” and “without a settled law” (38). On the basis of the ““barbarian” theory” the common law of the coloniser becomes “the law of the land” and determines the rights and entitlements of the subjects of that juridical order (37, 39). In *Mabo* the High Court thus recounted the sovereign ‘event’ which inaugurated the common law in Australia based on racist assumptions. The acts of ‘past’ sovereign governments could not be touched for this would destabilise the foundation of ‘present’ law and the ‘peace and order’ of the ‘postcolonial’ society. The ‘progressive’ recognition of previously disregarded rights thus involved the preservation and reiteration of past sovereign acts. The absolute disavowal of a repugnant past proved to be impossible. ‘Past’ sovereign ‘events’ are at some point in the future determined to be the repugnant though insistent basis of ‘present’ law.

1.1.3 *Sovereignty as ‘Finite and ‘Infinite’ in Mabo*

In *Mabo* the High Court asserted that a sovereign ‘event’ took place at some point in the past and was the ‘cause’ of a variety of now-abhorrent consequences such

as the dispossession of indigenous people. Nonetheless, this sovereign event is retained as the foundation of Australian law. However, preserving the foundation is an anxious and contradictory affair, particularly when judges also wish to retrospectively adjust what is 'now' perceived to be the case 'back then'. That is, finite sovereignty proves to be uncontainable. Let me explain this. A newly self-sufficient common law can 'now' recognise this abhorrence and 'shift' the implications and consequences of the sovereign 'event' by recognising 'native title'. In a subsequent decision of the High Court in *Wik Peoples v Queensland* (1996), Gummow J confidently asserted the 'presence' of a sovereign 'event' and the possibility of its alteration:

Thus, it was appropriate to declare in 1992 ...[*Mabo*]... the common law upon a particular view of past historical events. That view differed from assumptions, as to extent of the reception of English land law, upon which basic propositions of Australian land law had been formulated in the colonies before federation. To the extent that *the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation*, away from what had been understood at federation. (*Wik*, 182, emphasis added)

Was there such a shift in the foundation of Australian law? The *aporia* in this passage is its acknowledgement of the impossibility of a finite, fixed concept of sovereignty, while retaining the notion of the common law as the 'ultimate' foundation. But the explanation for the 'reception' of the common law to a 'vacant land' without a settled law was not disturbed. The common law was adjusted, but not its foundation. There is thus an imperative for both a finite and infinite foundation – a common law that is

the ‘ultimate’ foundation and one that can be ‘left behind’, adjusted to fit with current imperatives. How are these contradictory requirements addressed?

The ‘barbarian theory’ is retained as the theory explaining the foundation of Australian common law. Though this was said to be inconsistent with “facts as we know them today” (*Mabo*, 39), it remained the basis for the reception of the common law to a putatively ‘settled colony’. What did ‘shift’ in *Mabo* were the concomitants of sovereignty – whether sovereignty resulted in the Crown becoming the absolute owner of land or whether the antecedent proprietary rights of indigenous people survived annexation of their territory. Gummow J concludes that the common law does not have the methodological resources to address shifts in the interpretation of the past: “There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms” (*Wik*, 182). Instead he reasserted the methodology of the common law – one that would not enquire into its grounds (sovereignty is non-justiciable). According to Gummow J in *Wik*: “[T]he task of the court is to do, and be seen to be doing, justice between the parties ... *There is no higher or additional duty to ascertain some independent truth*” (ibid, 184; Citing Lord Wilberforce in *Air Canada v Secretary of State for Trade* [1983], emphasis added). Thus retaining a now abhorrent foundation and altering its implications involves both a sovereignty that is positioned beyond law (infinite sovereignty) and one that can be subjected to the insights of revisionist history and now adjusted.

Fitzpatrick matches these refusals in Australian native title cases to seek an ‘independent truth’ with Kant’s injunction against enquiries into law’s foundation (Fitzpatrick, 2002, 233-4). For Kant:

The origin of the supreme power, for all practical purposes, is *not discoverable* by the people who are subjected to it. ... [W]hether in fact an actual contract originally preceded their submission to the state's authority (*pactum subiectionis civilis*), whether the power came first and the law only appeared after it, or whether they ought to have followed this order – these are completely futile arguments for a people which is already subject to civil law, and they constitute a menace to the state. (ibid, 233, original emphasis)

The enlightenment demand that we pursue any enquiry to its end, Fitzpatrick argues, would reveal “the partial and contingent nature of ...[supreme] authority, reveal the poverty of its constituent claim to sovereign completeness – a completeness which a modernist Kant would see as necessary for effective rule” (ibid, 234). The colonial assertion of sovereignty was indeed ‘partial and contingent’. It was from the outset *inchoate*, needing to be confirmed by occupation and settlement (per Dean and Guadron JJ, *Mabo*, 78). And the assertion of sovereignty did not immediately dispossess the indigenous inhabitants for this happened by the sovereign granting of tenures “parcel by parcel” (*Mabo*, per Brennan J, 69). Nor is it clear when Australia became a “nation”.⁴³ The usurpation of sovereignty and territory did not result in the Crown acquiring absolute ownership of the land. Nor did it eradicate, despite genocidal efforts to do so, the traditional laws and customs of the indigenous peoples that are a condition, according to *Mabo*, of their recognition as proprietors of a subordinate interest in the land. Despite these multiple reasons to refuse a unitary, finite conception of colonial sovereignty, for the High Court sovereignty is a constitutive event that inhabits a singular time and space ‘back then’. Sovereignty is a monistic phenomenon that cannot be called into question in a municipal court.

⁴³ In *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975), Stephens J pointed to the uncertainty of when Australia became a ‘nation’.

The insight Fitzpatrick offers to explain the absolute and contingent senses of sovereignty raised here is this: “Supreme authority is inevitably delimited in its finitude, yet its sovereign capacity must be elevated beyond limit” (Fitzpatrick, 2002, 234). Sovereignty is at once finite *and* infinite. Sovereignty is rendered finite as a colonial violence that took place ‘back then’ and elevated beyond limit. This disjunction cannot be the occasion of a ‘postcolonial’ nation. The inauguration of the ‘postcolonial’ fails precisely because sovereignty cannot be both things at the same time, a rupture from and continuity of *colonial* sovereignty. For instance, Brennan J in *Mabo* treats sovereignty as ungraspable by municipal law - the assertion of sovereignty “is not justiciable in a municipal court” (31). However, there is the possibility of a renewed law, cleansed of imperial exceptionality:

Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. (29)

The exercise of colonial sovereignty is rendered finite and infinite, an event that took place “back then” but also one that is capable of reaching into the present and future as the force that ‘imprisons’ Australian law. Despite its subjection to an illimitable sovereign, the Australian High Court now has the “ultimate responsibility for declaring the law of the nation” (ibid).

In sum, the High Court in *Mabo* deployed the contradictory lineaments of sovereignty identified by Fitzpatrick – a delimited, finite sovereignty that established the common law “back then” on the basis that the indigenous inhabitants were

“barbarous”, “without a settled law” and thus too low on the scale of social organisation (*Mabo*, 37-8). But this sovereign assertion is not justiciable in courts established by the sovereign, and thus the assertion of sovereignty is ‘elevated beyond limit’. The *identity* of sovereignty as a finite phenomenon capable of being distinguished from the present ‘postcolonial’ law is thus paradoxically undermined by the assertion of non-justiciability that elevates sovereignty ‘beyond limit’ (sovereignty as infinite). The ‘postcoloniality’ of the common law itself is called into question by the elevation beyond limit of the imperial sovereign, for then, what limit marks the *difference* between the colonial assertion of sovereignty over a “desert uninhabited” (33) and a law founded on that assertion? Brennan J attempts to disavow the theory that explained the assertion of sovereignty, the ‘enlarged notion of terra nullius’, by separating sovereignty from law. But this is an assertion of a difference that is impossible if sovereignty is ungraspable. This is precisely why the (im)possible limit that marks the difference between sovereignty and law requires elaboration – a task I undertake in this thesis. In *Mabo* sovereignty is imbued with a plenitude that renders it substantial enough to be identified as the event that inaugurates a legal system, but this event is quarantined from any scrutiny. The ‘singular’ sovereign event is central to law as its foundation but also exceeds law as an event that is not justiciable. Calling into question a sovereign event that exceeds law is precisely what is at stake in attempts to inaugurate the ‘postcolonial’ – an attempt to resurrect buried identities, laws and communities that have survived on the periphery of the imperial settler society.⁴⁴ An ‘unknowable’ sovereign whose authorisation and legitimacy the courts

⁴⁴ The resurrection of identities, laws or communities on the basis of variously asserted essences of ‘race’, ‘tradition’, custom, the ‘authentic’ native and so on carry their own deeply problematic consequences that I take up in subsequent chapters. Such essences are the currency of postcolonial law and society in Australia.

dare not enquire into renders the distinction between colonial sovereignty and 'postcolonial' law impossible to sustain.

As we observed, there was a re-positioning of a colonial assertion of sovereignty as an 'event' that took place 'back then', one that can be separated from the 'postcolonial' law declared in *Mabo* which now recognises the antecedent proprietary rights of indigenous people. My assertion is that a delimited sovereignty, one that is 'singular', and 'monistic' – a finite sovereignty – is deployed in *Mabo* in order to 'separate' colonial sovereignty/law from the 'postcolonial' law that can depart from the sovereign 'event' that founded 'Australian law'. The court's deployment of a finite sovereignty (as the disavowal of acts of state which took place 'back then') failed as soon as it was proclaimed – that is, 'postcolonial' law also had to preserve its foundation in a colonial assertion of sovereignty. This colonial assertion of sovereignty thus has an infinite reach to the extent that it is the ground of 'past, present, and future' law and society. Such an infinite sovereignty is without 'limit', it is uncontainable and ungraspable. A conception of sovereignty without 'limit' raises the problem of its 'relation', for instance, with law and community. In my discussion of *Mabo* I have identified both a finite and infinite quality attributed to sovereignty. In what follows I wish to develop an account of the impossibility of finite/infinite sovereignty. I want to argue that sovereignty cannot be contained as an 'event' 'back then' (finite sovereignty), nor can it be the 'absolute' will without 'limit' which grounds law and community (infinite sovereignty). What account can be given of the 'spacing' between sovereignty and law? The impossibility of a finite or infinite conception of sovereignty is an account of sovereignty which I will develop through Jean-Luc Nancy's critique of the 'finitude of being'. I will argue, through

Nancy, that the impossibility of finite and infinite sovereignty implies a ‘relation’ – a relation that is the occasion of ‘community’ (Nancy, 1991, 4).

1.2 The Impossibility of Finite/Infinite Sovereignty

Nancy’s critique of the finitude of being is developed in *The Inoperative Community* (1991) and several other texts from which I will draw. Nancy’s concern with the relationship between sovereignty and law is posed explicitly in his essay “War, Right, Sovereignty - Technē” (2000c). This essay, written at the time of the Gulf War of 1991, explores the relationship between sovereignty and law as a question of thinking and rethinking the possibility of a ‘limit’. The (im)possibility of a ‘limit’ is elaborated as a question of ‘spacing’ and ‘separation’ (ibid, 136-40). The question of the ‘limit’, the ‘spacing’ between sovereignty and law, the very possibility of their separation, is central, as we observed, to the attempt to distinguish Australian ‘postcolonial’ law and society from its foundation in a ‘colonial’ sovereign ‘event’. By discussing “War, Right, Sovereignty - Technē”, I intend to dispel any objection that Nancy’s critique of the ‘finitude of being’, a concern of ‘first philosophy’⁴⁵, cannot be brought to bear on ‘real events’ of the world, and in particular on the ‘event’ of sovereignty in the ‘postcolonial’ context. To the contrary, Nancy calls for a thought that exposes “Every detail of the uses, claims, manipulations, aporias of sovereignty in the postcolonial world ...” (Nancy, 2000c, 103). Though this is only a passing reference, it is an opening, an invitation, which I wish to take up in the

⁴⁵ For an account of the ‘first philosophy’ with which Nancy engages, a rethinking of ontology, the relation between *logos* and the city, philosophy and community, a western philosophical concern from Aristotle to Heidegger, see Nancy, “Of Being Singular Plural”, (2000b), 21-28. It is beyond the scope of my thesis to trace these philosophical trajectories. For an incisive account of the proximity of Nancy’s thought to Heidegger’s critique of the Cartesian Cogito, see Ian James, “The Persistence of the Subject: Jean-Luc Nancy” (2002) 125-141.

discussion that follows. Additionally, Nancy's thought on the impossible 'finitude of being' is explicitly brought to bear on the sovereign 'event' in his consideration of the notion of 'jurisdiction'.⁴⁶

1.2.1 Finitude - Limit or Relation?

I will begin with a discussion of "The Inoperative Community", a text which draws together Nancy's problematisation of 'finitude', 'limit', and 'relation' as central to thinking and rethinking 'community'. Here Nancy argues that the impossibility of a 'limit' that absolutely encloses one being from another is the condition of community. It is apt to deploy the question of community alongside a questioning of the 'limit' between beings or phenomena, as it is a central tenet of Nancy's thought that a finite being, a singular being (being-one) delimited from another, is an 'event' of being in community. I wish to bring this thought to bear more explicitly on sovereignty. The impossibility of finite sovereignty, or the impossibility of an absolute totality (the State) that eradicates the question of 'limits' by the assertion of 'unity' or 'communion' can only be grasped by understanding how 'singularity', being-one, is an essential 'exposure' to an outside, being-more-than-one. At the end of this Chapter I will instantiate this critique of finitude in terms of the (im)possibility of 'sovereignty' in various accounts of the 'international', and in relation to the 'limit' of law.⁴⁷

⁴⁶ Here I wish to provide a sample of Nancy's engagements with the notion of sovereignty in order to establish the significance of considering Nancy's thought on the 'finitude of being' and 'being-in-common' in an enquiry into the nature of sovereignty.

⁴⁷ I relate Nancy's thought to sovereignty and law in several ways. The problematic of the finitude of being has already been explained as central to deconstructing the position beyond law attributed to sovereignty in the *Mabo* decision. I will also discuss Nancy's more explicit treatment of sovereignty and law in "War, Right, Sovereignty - Technē". Later, I will relate Nancy's thought to an explicit treatment of sovereignty in the context of international relations discourse through Jens Bartelson, *A*

In “The Inoperative Community” Nancy calls into question the possibility of an “absolute”, atomistic subject, as individual or state, which exists entirely “for-itself” (Nancy, 1991, 4).⁴⁸ According to Nancy, the individual subject or “total State” cannot be “perfectly detached, distinct or closed” (ibid). There cannot be a “being without relation” (ibid). Nancy sets out to establish that every finite, atomistic being, whether that is the individual subject or a State, implies a relation in its separation:

A simple and redoubtable logic will always imply that within its very separation the absolutely separate encloses, if we can say this, more than what is simply separated. Which is to say that the separation itself must be enclosed, that the closure must not only close around a territory (while still remaining exposed, at its outer edge, to another territory, with which it thereby communicates), but also in order to complete the absoluteness of its separation, around the enclosure itself. (ibid)⁴⁹

The ‘limit’ that marks the separation of a being (let’s say of an individual or state), in order to be absolutely separate, would have to be so thoroughly and ‘purely’ enclosed that it would not communicate on its outer edge with the subject, territory, space beside it. Such an absolute separation, Nancy argues, is impossible: “to be absolutely alone, it is not enough that I be so; I must also be alone being alone – and this of course is contradictory” (ibid). The idea of a finite being violates itself to the extent

Genealogy of Sovereignty, 1995. I will relate Nancy’s thought to an account of law by discussing Peter Fitzpatrick’s *Modernism and the Ground of Law*, 2001a. Here Fitzpatrick gives an account of law as an ambivalent combination of determination and responsiveness. Central to this account is a conception of law as an incessant movement across limits, what Fitzpatrick characterises as the ‘apposition’ of law. I will return, at the end of this Chapter, to make Nancy’s thought more generally applicable to the relationship between sovereignty and law through Bartelson and Fitzpatrick.

⁴⁸ On the critique of an absolute being ‘for-itself’ see the rich discussion in Nancy, “The Inoperative Community”, 1991, at 4.

⁴⁹ The finitude of the “Idea, History, the Individual, the State, Science, the Work of Art, and so on” are called into question in Nancy’s critique of the metaphysics of the “absolute” (ibid). For my purposes, I will confine my discussion to the critique of finitude, and not elaborate the deeper, post-Heideggerian critique of metaphysics that is set out in Nancy’s thought.

that this finitude implies a separation that is at once a ‘communication’ ‘*with...*’. One cannot say what is ‘beside’ (‘*with ...*’) finitude precisely because of the impossibility of ‘being alone’. In asserting its separateness, the absolute is undone by the “relation” (communication, community) to which ‘it’ is exposed (ibid).⁵⁰ The “relation” that this ‘communication’ implies violates the “essence” (as ‘absolute’) that an ‘absolute’ finite being asserts for itself. Finitude is impossible because being finite implies communication and relation. It is therefore in the “logic of the absolute” that “community comes perforce *to cut into*” the subject/being/state (ibid). It is this critique of finitude that I wish to bring to bear on the ‘presence’ of sovereignty as a discrete ‘event’.

A non-justiciable ‘act of state’ as the absolute decision that inaugurated a colony and its juridical order was deployed in *Mabo*. This sovereign ‘event’ was presented as the origin of ‘colonial’ law and society – an ‘event’ from which the future-oriented ‘postcolonial’ law and society could be disassociated. At the same time, this sovereign ‘event’ was preserved as the origin of Australian law – it was granted an infinite quality. Nancy’s thought interrupts the possibility of an ‘event’ which is finite, or an absolute totality with nothing beyond it. Thus the ‘spacing’ of sovereignty in relation to law in *Mabo*, the separation asserted as the condition of differentiating colonial/‘postcolonial’ sovereignty, law and society, is called into question by Nancy’s critique. An absolute sovereignty cannot be a discrete entity or an infinite totality which has no relation with what is adjacent to it. Crucially, this failure of finite sovereignty is the occasion of relation, community. Through Nancy I will explain how the being singular at once involves a division and a relation. Being

⁵⁰ The ‘presence’ of the absolute as absolute is thus called into question, undone by the logic of absoluteness.

is not infinite because it always already implies this division and relation. I will argue, then, that sovereignty, at the instant of attempts to place it beyond law, is exposed to a relation *with* law. I will return later to explain this co-presence of sovereignty/law through the notion of 'jurisdiction'. First I will elaborate how the failure of finitude is the occasion of relation or 'community'.

1.2.2 '*Being in Common*'

The impossibility of an individual being-alone does not result in the impossibility of a 'singular being'. Nancy's characterisation of the impossibility of finitude demonstrates that the logic of 'being-one' is the occasion of 'community'. His point is that 'singularity' implies a plurality of singular beings (ibid, 6). Singularity does not take place at the "level of atoms" but in the "inclination" ("*clinamen*") between one being and another (ibid, 3-4, 6-7). It is this inclining that opens the possibility of "being-in-common" (ibid, 4). What, then, is 'being-in-common'? Nancy explains 'being-in-common' in multiple ways in several texts.⁵¹ One approach is through a discussion of death. The death of an individual, he argues, cannot be disassociated from the individual's being-in-community. An individual cannot know or experience her/his own death. The death of the individual, the ultimate testimony to the finitude of existence, cannot reveal itself to this finite being. Though an individual's death, the death of an "*I*" is "most proper to it and most inalienably its own", the "*I* cannot say that it is dead" (Nancy, 1991, 14). There is thus a "reciprocal revelation" of death and community (ibid). The death of a being is revealed by 'being with' others, and this is the community that experiences the death

⁵¹ See the section on "Co-appearing" in Nancy, "Of Being Singular Plural", 2000b, 56-65; and Nancy, "Sharing Freedom: Equality, Fraternity, Justice" in Nancy, 1993a, Ch. 7.

of its members (ibid). Death is not experienced in an “authentic sense” by the community – “we are always just “there-alongside”” (ibid, 33). The “sharing” of knowledge in (the other’s) death is only a recognition that there is “nothing recognizable” (ibid). Nancy distinguishes this experience of being-finite-through-community from a “limited community as opposed to an infinite or absolute community” (ibid, 27). Being-in-common is neither an assertion of a limit *between* communities or an absolute community:

Sharing comes down to this: what community reveals to me, in presenting to me my birth and my death, is my existence outside myself. Which does not mean my existence reinvested in or by community, as if community were another subject that would sublate me, in a dialectical or communal mode. *Community does not sublate the finitude it exposes. Community itself, in sum, is nothing but this exposition.* It is the community of finite beings, and as such it is itself a *finite* community. In other words, not a limited community as opposed to an infinite or absolute community, but a community *of* finitude, because finitude “is” communitarian, and because finitude alone is communitarian. (ibid, 26-7)

Finitude can only be experienced in community. What it means to be *in* community is to be ‘exposed’ to the fact that being finite is always already ‘being-in-common’. As Nancy argues, community does not absorb or ‘sublate’ finitude. Instead, community is the exposition of finitude. ‘One’ cannot be ‘One’ without this exposition in community. What is significant in this discussion for my purposes is that the ‘sharing’ that takes place in ‘death’ is the sharing of the knowledge of a ‘limit’ – an ‘experience’ of finitude that can only ‘happen’ in community. The experience of a ‘limit’ is the occasion of community.

What are the implications of this thought for a critique of a finite conception of sovereignty? As we saw in the Australian ‘postcolonial’ context, a finite conception of sovereignty is deployed as the ‘ground’ or foundation of Australian law and society. I have already pointed out how Nancy’s thought insists on a relation between sovereignty and law. Colonial sovereignty can only be preserved and disavowed as the ground of ‘postcolonial’ law and society if sovereignty can be contained, that is, presented as a discrete finite entity. One implication of Nancy’s critique, when it is brought to bear on the attempt to inaugurate ‘postcolonial’ law and society in Australia, is that it undoes the possibility of finite sovereignty as a discrete, delimited *ground* of (‘postcolonial’) law and society.⁵² As finitude has no ‘presence’ outside its sharing or relation, the very possibility of a self-sufficient, finite sovereignty is refuted. Sovereignty-as-One cannot ‘be alone’. The birth of finitude, Nancy argues, is without “ground”:

The “ground” is itself and as such, already the finitude of singularities.

It is a groundless “ground”, less in the sense that it opens up the gaping chasm of an abyss than that it is made up only of the network, the interweaving, and the sharing of singularities. ... There is nothing behind singularities – but there is outside it and in it, the immaterial and material space that distributes it and shares it out as singularity. (Nancy, 1991, 27)

If finitude is without ‘ground’, if it takes place only in and through the distribution and sharing of singularities, then there is scope to question the very possibility of an absolute ground of law and society which can be preserved and disavowed as an

⁵² At this point I am not attempting a comprehensive instantiation of Nancy’s thought by bringing it to bear on the Australian ‘postcolonial’ context. Instead, I merely wish to signal the concrete significance of Nancy’s thought for the problematic of finite/infinite sovereignty in the Australian ‘postcolonial’ context which I identified at the outset. I will return to a more thorough instantiation of Nancy’s thought in the next Chapter.

‘event’ that took place ‘back then’. Sovereignty cannot be finite and thus capable of being grasped and disavowed. Nor can sovereignty be infinite – preserved as an absolute ground of all that is to come. This was the problematic identified in my reading of *Mabo*. Nancy’s critique of finitude suggests that it is the distribution of ‘singularities’ and the sharing that takes place at the ‘limit’ of singularity that accounts for the possibility of finite being. Bringing this thought to bear on a finite conception of sovereignty, we need to ask what are its limits, what are the networks in which it is distributed? How is sovereignty shared out as a singularity? I will take up these questions of the ‘limit’ and ‘end’ of sovereignty through Nancy’s thought on the sovereign right to war. Before moving to that I will discuss how, for Nancy, the absent ‘ground’ of finitude (of sovereignty) is the condition of community. Community is not the result, the ‘product’, of the absence of a ground for finitude. Community is the ‘co-appearance’ of finitude. This demands more explanation. This discussion of finitude, with which I will persist for a little longer, sets up the basis for the claim (elaborated at the end of *Chapter Two* and in *Chapter Three*), that ‘jurisdiction’ designates the co-presence of sovereignty, law and political community.

1.2.3 Dis-position of Origins - Refusing One-Origin of Law

For Nancy “finitude itself is nothing” (Nancy, 1991, 28). It is not a ground, essence or substance (ibid). Finitude is always a sharing. Nancy persistently makes the point, in several texts, that there is no “original or origin of identity” (ibid, 33) which takes form through “exclusion”, not even an “inclusive exclusion” (Nancy, 2000b, 24). Rather than a self-sufficient being, or a being constituted by exclusion, Nancy proposes the original “dis-position” of beings (ibid, 24-5). For Nancy, the

“origin” of being is a “dis-position” (ibid, 25). Central to this claim is the proposition that “the “outside” of the origin is “inside”” (ibid, 11, 13). There is no purely delimited ‘outside’ that grounds or constitutes being. I will briefly set out what Nancy means by original ‘dis-position’.

Nancy approaches this question through an account of the origin which refuses an essential ground of being in community as reason or humanity - the appeal to “one-origin” (ibid, 24).⁵³ Instead he proposes an ontology of origin where access to an origin is refused by its concealment in multiplicity (ibid, 10-11). ‘We’ can’t identify ourselves in or as the origin – ‘we’ can only identify *with* it. Nancy refers to this as “originary coexistence” (ibid, 11). To hazard putting this simply, I am a *singular* being *among* a multiplicity of other singular beings. I and each other I are originally singular, but it is a singularity that is at once plural: the latin *singuli* means “one by one” (a word that exists only as a plural) (Nancy, 2000d, 156). The other of a singular being-origin is not the “essential stranger who is opposed to what is proper” (Nancy, 2000b, 11), as in many constructivist accounts. The other of being-origins is “one of the two” (ibid). This ‘other’ “is “one” among many insofar as they are many; it is *each one*, and it is *each time* one, one *among* them, one among all and one *among* us all” (ibid). Each one is the other origin of us all because we cannot ‘be alone being alone’. I am, we are, singular plural. In this way the ‘being-with’ is never secondary to an origin (Nancy, 1991, 14; Nancy, 2000b, 27, 32). The origin itself is a coexistence of origins. The ‘origin’ is not to be found ‘outside’ being. This is essentially what is expressed in the phrase ‘Being singular plural’: “The plurality of beings is at the foundation of Being” (Nancy, 2000b, 12). The meaning of Being, the

⁵³ The politico-philosophical traditions that Nancy wishes to displace with his account are the social contract theories of Rousseau and liberal humanism.

significance of the relationship between being(s) and Being, and the original dis-position of beings is explained in the following passage which is worth quoting at length:

A single being is a contradiction in terms. Such a being, which would be its own foundation, origin and intimacy, would be incapable of *Being*, in every sense that this expression can have here. “Being” is neither a state nor a quality, but rather the action according to which what Kant calls “the [mere] positing of a thing” takes place (“is”). The very simplicity of “position” implies no more, although no less, than its being discrete, in the mathematical sense, or its distinction *from*, in the sense of *with*, other (at least possible) positions, or its distinction *among*, in the sense of *between*, other positions. In other words, every position is also dis-position, and considering the appearing that takes the place of and takes place in the position, all appearance is co-appearance [*com-parution*]. This is why the meaning of Being is given as existence, being-in-oneself-outside-oneself, which *we* make explicit, we “humans”, but which we make explicit, as I have said, *for* the totality of beings. (ibid, 12, original emphasis)

This dis-position is the instance of a sharing. Though the significance of this point for the thought of sovereignty is more directly posed in “War, Right, Sovereignty - Technē” (Nancy, 2000c), a text I will turn to shortly, it is worth emphasising here that the ‘original dis-position’ of finite beings is the ontology that informs Nancy’s thought on sovereignty.

Along with Nancy I want to argue that sovereignty does not occupy a finite position ‘outside’ law. Nor can it be ‘contained’ for the purpose of ‘preservation’ and

‘disavowal’ as we observed in the attempt to inaugurate a ‘postcolonial’ law and society in Australia. The ‘position’ of the sovereign is always already a ‘*disposition*’. That is, sovereignty always appears together, alongside, along with, a law that is a law of community. Just as finite being cannot be separate, cannot ‘be alone being alone’, sovereignty is not capable of such finitude. Singularity is, as we observed in the discussion above, always a being-exposed as ‘plurality’. Nancy also makes this point in “The Inoperative Community”:

what holds the place of the “origin” is the sharing of singularities. This means that this “origin” – the origin of community or the originary community – is nothing other than the limit: the origin is the tracing of the borders upon which or along which singular beings are exposed. (Nancy, 1991, 33)

The question of ground or origin is about the ‘limit’. To the extent that sovereignty (as singular) is posed as the ground of state, law, society etc., such singularity raises the question of its ‘limit’. What Nancy emphasises is that a ‘limit’ is the occasion of a communication, an exposure to what lies across the ‘limit’.

Finitude appears, is exposed, and thus exists as communication (ibid). Finitude “co-appears”, “*compears*” (ibid). That is, finite being always presents itself together:

for finitude always presents itself in being-in-common and as this being itself, and it always presents itself at a *hearing* and before the judgment of the law of community, or, more originarily, before the judgment of community as law. (ibid)

A finite, singular being (one that I take to be indicative of a monistic sovereign – that is to say, also indicative of the impossibility of such monism) presents itself,

according to Nancy, before the ‘law of community’ and ‘community as law’. What is this ‘law of community’ before which finitude presents itself? What does it mean to say that finitude is ‘more originarily’ presented before the ‘judgment’ of ‘community as law’? The ‘law of community’ connotes the ontology of ‘being-in-common’. Being-in-common is how finitude *always* presents itself. ‘Community as law’ is the presentation, or the originary co-presentation, the co-presence, of finitude. There is no One origin. Nancy confirms this in his recent reflection on the “The Inoperative Community”, when he claims that:

there has been, already, always already, a ‘work’ of community, an operation of sharing out that will always have gone before any singular or generic existence, a communication and a contagion without which it would be unthinkable to have, in an absolutely general manner, any *presence* or any world, since each of these terms brings with it the implication of a co-existence or of a co-belonging (Nancy, 2003d, 32)

The origin is *always already* a co-origination. This is the law of community that Nancy refers to in “The Inoperative Community” (Nancy, 1991, 28). The ‘presence’ of a concept such as sovereignty is always already a co-appearance that raises the problem of the ‘limit’ that separates – the limit that is a site of a sharing.

I have argued that sovereignty is a relational concept that involves a ‘sharing’ across limits. This offers one approach through which the ‘presence’ of sovereignty can be called into question. Indeed, the very ‘place’ of sovereignty as unity and essence must be undone. Pursuing this line of discussion is a useful way to concentrate my concern to call into question the possibility of a finite or infinite conception of sovereignty. In what follows I will extend the critique of finitude

(sovereignty as One), the co-appearance of singularity, through a discussion of Nancy's consideration of the relationship between sovereign war and law. How might we consider the 'End' of sovereignty? The 'End' of sovereignty interrogated by Nancy not only calls into question the 'presence' of sovereignty, it calls for an end to Sovereign Ends. That is, we must consider what it means to call for an evacuation of the place of the sovereign.

1.3 The Empty Place of Sovereignty

The discussion in the previous section considered the persistence of One-origin and suggested that the critique of the finitude of being points to the original disposition of origins. The 'presence' of a concept such as sovereignty can then no longer be thought as monistic, as One, or as the 'cause' in a linear narrative of 'events' such as 'sovereignty is the source of law'. But what are the juridico-political implications of pointing to the 'sharing' that takes place between a 'limit' or asserting the ontological plurality of being? It is not sufficient to merely assert a singular-plural ontology in order to deconstruct the monistic 'presence' of sovereignty. Nancy's thought moves in the direction of bringing an end to the 'Sovereign End' (Nancy, 2000c, 136-7). That is, he argues that the plural spacing of the world "*is itself the empty place* of sovereignty" (ibid, 137, original emphasis). The 'empty place' of sovereignty refers to the impossibility of an essential 'unity', commonality, or idea of the 'good'. What he means by this is that any idea of "the end", or the "common good", or the "common as good" is no longer viable (ibid). The impossibility of an essential good associated with a sovereign 'end' is highlighted, for my purposes, when Nancy refers to the example of the "*the empty place of justice* (at the foundation

of the law)” (ibid, original emphasis). There is no essence, no democracy, no unity as ‘people’, and indeed, no law, that can form the just foundation of law.⁵⁴ Sovereignty or power is thus emptied of any essentialised content that represents the ‘good’. Nancy’s argument resonates with Claude Lefort’s influential study of modern democracy where he explores the problematic of the ‘empty place of power’ in representative democracies (Lefort, 1988). I will relate Lefort’s thought on the ‘empty place of power’ to Nancy’s consideration of this question below. First I will set out how Nancy reaches the point of claiming that the ‘empty place of sovereignty’ must be thought as “nonsovereign” in the sense that Georges Bataille intended when he said “Sovereignty is NOTHING” (Nancy, 1991, 18; and Nancy, 2000c, 139).⁵⁵ I will consider what it might mean for sovereignty to be ‘Nothing’ in the final Chapter of this thesis, where I give an account of contemporary instantiations of imperial sovereignty.

1.3.1 Towards a Thought of the ‘End’ of Sovereignty

The question of the ‘limit’ which has pervaded the preceding discussion of Nancy’s thought will now be taken up through the notion of an ‘End’ – the ‘End’ as

⁵⁴ Below I will consider the work of John Borrows in this light – his attempt to inaugurate a ‘proper’ ‘postcolonial’ law and society in accordance with the ‘rule of law’. My claim, in accordance with Nancy, is that the foundation, the sovereign place, must be emptied rather than filled again (and again) with the pretensions of Oneness, or the ‘propriety’ of another ‘proper’ ground.

⁵⁵ See also Georges Bataille, *The Accursed Share: An Essay on General Economy, Volume III, Sovereignty* (1993). Bataille’s thought on sovereignty arose out of a consideration of the gift economy in opposition to a restricted economy of exchange. A sovereign life, for Bataille, involved the radically anti-utilitarian possibility of a life without limits – a life that grappled with overcoming the anguish of death, where a state of “objectlessness” would be experienced as NOTHING, (Bataille, 1993, 195-257 at 234). In *Chapter Four* I develop a reading of Nancy’s reception of Bataille. There I will argue that the singular-plural character of sovereignty, its in-finitude, offers an insight to what it means to claim that sovereignty is ‘Nothing’ in contemporary geopolitical contexts such as the ‘war on terror’. I also return, in *Chapter Four*, to consider the implications of sovereignty as ‘Nothing’ for ‘postcolonial’ law and society. It is apposite to wait until *Chapter Four* to develop this argument as it will follow more directly from my attempt to de-position imperial sovereignty. However, I will offer some introductory comments on sovereignty as ‘Nothing’, shortly.

limit and *telos*, and also as the end of a place occupied by a ‘sovereign’ (Nancy, 2000c, 138). Sovereign ‘End’ signifies the sovereign claim to designate and determine a *telos* as law and its exception in War. Nancy’s thought seeks an end to this sovereign extremity through a deconstruction of the ‘presence’ of sovereignty. The question of the ‘end’ is linked to the limits of ‘presence’ in Nancy’s thought. As Emma Campbell notes:

“The end” does not simply mark the termination of a certain idea or concept; it indicates the erasure of any clearly assignable meaning associated with that concept or idea. Likewise, the recognition of finitude does not ground a concept that replaces it; it “establishes” new concepts as evacuations of meanings that – in being continually exposed to their own limit – are never established or complete. (Campbell, 2003, 44)

For Nancy, “every question about ends leads back to sovereignty” (Nancy, 2000c, 120), and to war as the “execution” of sovereignty (ibid, 117). War is the ‘technology’ of sovereignty not only as its means (not as a means to a sovereign end), but as its “mode of execution, manifestation, and effectuation in general” (ibid). War is sovereignty’s “mode of accomplishment”, its “finish” (ibid). What is meant by ‘finish’ is something being carried “to the limit of its own logic and its own good, that is, to the extremity of its own Being” (ibid, 118). How to think this ‘extremity’, the question of the ‘limit’, is at the heart of coming to terms with the relation between sovereignty and law. Nancy’s engagement with these questions raises the problematic of sovereignty in the form I identified in relation to *Mabo*:

The whole problem, if there is a problem, is of knowing if the execution, the finish, is finite or infinite, and in what sense of these words. (ibid)

This brings the problem being discussed here into very sharp focus. When it is asserted that 'law' is the 'end' (as *telos*) of sovereignty, is the character attributed to sovereignty finite or infinite? Is law produced by a finite sovereign 'event' 'back then'?⁵⁶ Or does the sovereign capacity to exceed all limits, to be uncontained by law, to be law's exception and excess, disclose an infinite quality? Infinite sovereignty, if it were possible, would be a thoroughly accomplished sovereignty. Nancy's persistent concern is to call into question such a completeness of 'position' or 'relation' – that is, the possibility of such an accomplished sovereignty. I will return, in *Chapter Two*, to discuss the implications of this critique of a finite/infinite sovereignty - a sovereign *telos* as the establishment of a juridical order and colonial settler society or an infinite sovereign where sovereignty is an accomplished totality - for 'postcolonial' law and society.

Nancy explores the critique of a finite and infinite conception of sovereignty in his essay "The Jurisdiction of the Hegelian Monarch" (Nancy, 1993c).⁵⁷ There he argues against the possibility of a 'singular' sovereignty that is complete as 'unity' or 'essence' which can 'symbolise' or represent the 'people'. 'Singular' sovereignty is never accomplished absolutely. What results from this incompleteness of being, this failure of 'position', 'singularity', or 'presence' is central to accounting for community. Nancy's point is that both finite and infinite sovereignty are impossible, or at the very least, there must be a thought of sovereignty beyond a finite/infinite sovereignty (Nancy, 2000c, 139). Though there have been numerous attempts to subordinate or even erase the persistence of sovereignty-as-end by the creation of

⁵⁶ For an account of the foundational role of sovereignty in relation law, see Nancy, 2000c, 131-32.

⁵⁷ This text will be discussed below in considering the problematic of sovereignty as it is manifested through the notion of 'jurisdiction'.

“inter-, trans-, or supranational sovereignties” (ibid, 130) (the League of Nations, United Nations, “Europe” are the examples Nancy mentions), the problem of “End” persists (ibid, 131). The question is how to think without ‘end’, without finitude and the ‘finishing’ of sovereignty:

How [is one] to think without end, without finishing, without sovereignty – and, in this, without resigning oneself to a weak, instrumental, and slavishly humanist thinking of the law (and/or “communication,” “justice,” the “individual,” the “community” – all of which are concepts that are debilitated insofar as there has been no response to this question)? (ibid, 133)

By addressing the relation between sovereignty and law through the figure of ‘War’, Nancy demonstrates that the nature of sovereignty is a question that can be taken up as the question of the ‘limit’. Nancy’s objective is to think sovereignty beyond its conception as an ‘exception’ “pure and simple” (Nancy, 2000c, 108). Another way of putting the question of the limit is as a problem of ‘spacing’ and ‘relation’ (ibid, 136-7).⁵⁸

The relationship between a sovereign war and law (as distinct from a war as ‘police action’ or as ‘civil war’) is posed as a problem of the ‘spacing’ between sovereignty and law.⁵⁹ How do we account for a ‘spacing’ or separation between sovereign war and law when the possibility of their separation (difference) is undermined by the fact that sovereign war is an execution of (international) law, as ‘just war’, ‘policing’ ‘rogue states’ and ‘bad leaders’? It is thus difficult to separate war from law. Additionally, a difference between sovereign war and law is

⁵⁸ I will elaborate this notion of ‘spacing’ below.

⁵⁹ For a discussion of sovereign war distinct from ‘police action’, see Nancy, 2000c, 106-9; for a discussion of the sovereign ‘end’ as law, ibid, 115-121; for a discussion of sovereignty, law and finitude as a matter of ‘spacing’, ibid, 136-139.

undermined when the sovereign exception exempts itself from law, takes itself 'outside' law, and yet preserves law.⁶⁰ The 'position' of One-being (sovereignty) discloses a 'relation' with conditions and phenomena that are other than, *other* to, the sovereign 'event' – for instance, 'law' and 'community' (Nancy, 2000c, 136-140). This unsettles the possibility of a discrete, finite sovereignty. But then there is the challenge of thinking law and community as something other than a 'Sovereign End'. There are thus two aspects to Nancy's interrogation of sovereignty – the critique of its character as finite/infinite, and a questioning of how law and community can be thought without being symbolised, grounded or 'finished' (to use his term), by a sovereign decision. A shorthand means of expressing this collection of reflections on the singular-plural character of sovereignty is to claim that sovereignty is at once finite and infinite, *in-finite*. The in-finitude of sovereignty is an im-possibility. Infinitude cannot be presented as such. Conceptualising this 'lack', this non-place or 'empty-place' of sovereignty must be considered by rigorously thinking the character of the sovereign 'limit'.

Nancy addresses the 'limit' of sovereignty as a question of the very possibility of a sovereign-being as a discrete entity. The limit of sovereignty is posed in relation to other sovereigns and in relation to law. Sovereignty exists in relation to other sovereigns, in a system of sovereignties. The right to wage war, Nancy argues, is the most sovereign of all rights:

because it allows a sovereign to decide that another sovereign is its enemy and to try to subjugate it, indeed to destroy it, that is, to relieve it of its sovereignty (here, life comes into the bargain ...). It is the sovereign's right to confront

⁶⁰ There is some proximity between this line of questioning and Carl Schmitt's decisionist approach to sovereignty. There are, however, significant differences. I will critique Schmitt's thought in *Chapter Three* in light of Nancy's critique of the finitude of being.

his *alter ego ad mortem*; this is not only an effect of sovereignty but also its supreme manifestation (Nancy, 2000c, 106)

The sovereign decision on the enemy and its destruction has the capacity to create new law and a new distribution of sovereignties. The majority of national and state sovereignties have such an origin (ibid, 107). Sovereignty has an existence in and through its relation to law. That is, one “extremity” of war is law, convention and order (ibid, 106). The sovereign right to war exempts itself from all law, but it has law as an ‘end’ – an ‘end’ as *telos* and limit:

The right to wage war excepts itself from law at the very point where it belongs to it both as an origin and as end. This point is a point of foundation, in so far as we are incapable of thinking of foundation without sovereignty, or of sovereignty itself without thinking in terms of exception and excess. The right to wage war excepts itself from law at a point replete with sovereign brilliance. Law does not possess this brilliance, but it needs its light, and its founding event. (ibid, 107)

The sovereign exception on war ‘excepts’ itself from law *and* ‘belongs’ to law as origin and end. There is then a ‘sharing’ in sovereignty-law, a passing between, a passage from war-to-law.⁶¹ There is a possibility that law may be suspended, destroyed, re-inaugurated, as sovereignties re-distribute themselves. Law can then be expressed as a sovereign distribution. Thus, at the most sovereign moment of war (where the sovereign is usually ‘positioned’ ‘beyond’ law), there is a ‘relation’ to law. The sovereign ‘event’ which is regarded as archetypically ‘singular’ reveals itself to be ‘plural’:

⁶¹ This claim can be sustained empirically when considering the ‘war on terror’ as a ‘war without end’. I would argue that such an ‘infinite’ sovereign war is impossible. War is for the preservation of a ‘particular’ order or ‘nation’ – and is thus imbued with particular ‘ends’ and ‘limits’. I will return to this point when considering the *habeas corpus* cases in relation to the Guantanamo detainees in *Chapter Three*.

If sovereignty is the grand, political term for defining community (its leader or its essence) that has nothing beyond itself, with no foundation or end but itself, what becomes of sovereignty when it is revealed that it is nothing but a singularly plural spacing? How is one to think sovereignty as the nothing of the *with* that is laid bare? (Nancy, 2000b, 36)

Nancy's claim is that sovereignty is not a singularity, it is not finite. Sovereignty is a 'plural' relation, a spacing between entities. Thinking sovereignty as the 'nothing of the *with* that is laid bare' involves thinking of sovereignty not as end but as 'an empty place' (Nancy, 2000c, 137).

Nancy has developed his thought of the 'empty place' of sovereignty in relation to the problem of sovereignty as a form of 'worldwide' authority (Nancy, 1997, 3).⁶² There are a plethora of claims that sovereign authority is becoming 'worldwide' (Hardt and Negri, 2000 and 2004; Bauman, 2002; Urry 2002; Ignatieff 2003b).⁶³ According to these pronouncements sovereignty is now 'without limit'. Is this the arrival of the 'empty place' of sovereignty, where an amorphous sovereignty is now without 'limit'? Has a new form of sovereignty encompassed the 'world'? Nancy confronts the problem of 'worldwide' authority by examining the notions of 'sense' (value) and 'world' (Nancy, 1997, 54-7).⁶⁴ The problem of the 'sense of the world' matches the problem of the possibility of 'worldwide' authority in the following way. The question of authority, in its modern 'theologicopolitical'

⁶² I don't propose to develop this link of the end of sovereignty to the question of 'globalness' at length here. In *Chapter Four* I will contrast Nancy and Antonio Negri in light of the critique of sovereignty developed here. There I consider at length what it means to confront an 'imperial sovereign', a sovereign 'empire' that is becoming 'worldwide'. Is 'worldwide' sovereignty possible? In addressing this question I will consider Nancy's recent writings on 'globalisation', for instance, Nancy, 1997, 2003e, and 2003f. On the implications of Nancy's thought for a critique of 'globalisation', see Ignaas Devisch, 2002.

⁶³ I will give a detailed account of these in *Chapter Four*.

⁶⁴ I should stress that I am only providing a brief sketch of this problematisation by Nancy. A full account of each of these terms will be provided in *Chapter Four*.

manifestation has always been a question of the ‘source’ of value. Modern accounts of authority placed the ‘West’ as the source of ‘civilisation’ (Nancy, 2003c, 37). The ‘history’ of the ‘West’, its ‘reason’ and ‘humanity’, were the source of the ‘sense’ of the ‘world’. However, this ‘centrality’, this finitude of the West, is no longer sustainable. ‘Globalisation’ is the becoming ‘infinite’ of a ‘finitude’ – that is, the dispersal of sovereignty, identity, community and so on. The source of the ‘sense of the world’ is no longer a transcendent Christian God (Nancy, 1997, 54-5). The ‘spacing of the ‘world’ is thus not measured or arranged by reference to a ‘transcendent’ source of authority. This is what drives the now pressing question of ‘worldwide’ authority. Worldwide authority is a manifestation of “sovereignty without sovereignty” (Nancy, 2000c, 134, and generally 136-140). This is the problem of the ‘nonsovereign’ or ‘empty place’ of sovereignty.⁶⁵

The ‘empty place of sovereignty’ is, of course, not a ‘place’ to be named or identified but a condition that is to be approached through a critique of finitude. That is, the ‘empty place’ of sovereignty is to be understood through the im-possibility of a monistic conception of sovereignty, the exposure to ‘being in common’, and the absence of an ‘essence’ or discrete unity that purports to occupy a ‘sovereign place’ (Nancy, 2000c, 138-9). The approach offered by Nancy for seeking the extreme limit of the ‘end of sovereignty’ is proposed through a question – “the question of a *nonsovereign meaning as the very sense of the humanity of humans and the globalness of the world*” (ibid, 138, original emphasis). The “relation of nonsovereign meaning” is to be ‘invented’, it is to come (ibid). Drawing on Bataille’s vision that ‘sovereignty is NOTHING’, Nancy offers the following attributes that an

⁶⁵ I will return to consider this questioning of ‘worldwide’ sovereignty and its implications for undermining ‘imperial sovereignty’ in *Chapter Four*.

end to the archaism of sovereignty must involve: there should be nothing to “attain”, no “accomplishment”, “achievement”, or “finishing” (ibid, 139). In contrast, sovereignty as an ‘event’ involve these characteristics of ‘attainment’, ‘accomplishment’, or ‘achievement’ of a ‘new order’, ‘society’ and so on. These were all attributes of the finite and infinite conceptions of sovereignty that I identified in Australian ‘postcolonial’ law’s characterisation of sovereignty. While finitude, the ‘presence’ of sovereignty, is a spacing that is always already a ‘sharing’ – one that Nancy treats as a condition of the “global world” – what is central to ‘emptying’ the monistic place of the sovereign is that the meaning of sovereignty should no longer occur “in a totalization and presentation (of a finite and accomplished infinite)” (ibid). A ‘totalization’, a presentation of sovereignty as discrete and accomplished is precisely what occurred in *Mabo*. I will return in the next Chapter to explain how such a characterisation of sovereignty, though pitched as the condition of ‘postcolonial’ law and society, reasserted One sovereignty and One law as an essential basis for community. I will close this section by relating Nancy’s thought on the ‘empty place of sovereignty’ to Lefort’s consideration of the ‘empty place of power’ in modern democracies (Lefort, 1988).⁶⁶ This will facilitate relating Nancy’s critique of finitude, in later Chapters, to other thinkers who have grappled with the relationship between sovereignty and law.

⁶⁶ There are several reasons for relating Nancy’s thought to Lefort. First and foremost, the formulation of the question of the ‘empty place of power’ and the reasons for posing it are virtually identical in the two thinkers. Second, Lefort’s thought is generally more accessible and may assist in relating Nancy’s thought to other thinkers who grapple with questions of foundation, legitimacy of power, the ground of community and so on.

1.3.2 The Lack of Sovereignty

According to Lefort, the ‘empty place of power’ in modernity is a corollary of the absent essence of law (Lefort, *ibid*, 17-8). I will not rehearse the history of modern political thought which Lefort discusses in order to arrive at the condition of an absent essence. Suffice it to say that the abject condition that results from the loss of God or the absence of another transcendent basis for grounding law creates a problem of legitimacy for posited law. Moreover, the positing of another ‘essence’ in the twentieth century, another ‘One’ as the basis for law, took the totalitarian forms of History (Communism) and ‘People-as-One’ (Fascism) (*ibid*, 13, 45-6). What follows, then, in modernity is a preoccupation with foundations – that is, the search for a legitimate basis for the exercise of power. Lefort contends that a distinctive feature of modern democracy is the search for a new “determination-representation” of the ‘place of power’ (*ibid*, 224-5). The feature of modern democracy is that power is an ‘empty place’, and it thereby maintains a gap between the symbolic and the real:

It does so by virtue of a discourse that reveals that power belongs to no one; that those who exercise power do not possess it; that they do not indeed embody it; that the exercise of power requires a periodic and repeated contest; that the authority of those vested with power is created and re-created as a result of the manifestation of the will of the people. (*ibid*, 225)

Lefort then draws a distinction between ‘power belonging to no one’ and the notion of the ‘empty place of power’ (*ibid*, 225-6). The idea that ‘power belongs to no one’

involves the denial of power to any particular person (ibid).⁶⁷ This reflects the distribution of power in models of representative democracy where no single person holds absolute power.

In contrast, the notion of the 'empty place of power' is very close to Nancy's formulation of the original dis-position of beings - the sharing and exposure of one being to another without an essential condition that gives content and determination to their being-in-common. Here it is worth quoting Lefort in full to show how his concern with the question of legitimacy for modern law and democracy, and his notion of the 'empty place of power' reflect the trajectories of Nancy's arguments in relation to the 'nonsovereign' place – the idea that sovereignty should be 'nothing':

The reference to an empty place ... implies a society without any positive determination, which cannot be represented by the figure of a community. It is because the division of power does not, in a modern democracy, refer to an *outside* that can be assigned to the Gods, the city or holy ground; because it does not refer to an *inside* that can be assigned to the substance of the community. Or, to put it another way, it is because there is no materialisation of the *Other* – which would allow power to function as a mediator, no matter how it were defined – that there is no materialisation of the *One* – which would allow power to function as an incarnation. Nor can power be divorced from the work of division by which society is instituted; a society can therefore relate to itself only through the experience of an internal division

⁶⁷ Lefort puts it like this: It is akin to "The old Greek formula to the effect that power is *in the middle* (and historians tell us that it was elaborated within the framework of an aristocratic society before being bequeathed to democracy) still indicates the presence of a group which has an image of itself, of its space and of its bounds", ibid.

which proves to be not a *de facto* division, but a division that generates its constitution. (ibid)

A society that can only relate to itself through the experience of an internal ‘division that generates its constitution’, I wish to argue, matches Nancy’s formulation of the im-possibility of the finitude of being. Recall that it is the exposure across ‘limits’, being at once contained and exposed, the in-finitude of being, that accounts for the im-possibility of finitude. Finitude can only be because of its necessary exposure across a ‘limit’. Thus finitude is the experience of the inevitable transgression of such limits. Sovereignty, like all being, is made present through a ‘division’. The ‘division’ is not a mere constitutive exclusion of the unremitting other. Rather, it is an internal division, a setting and transgression of horizons. In *Chapter Three* I will provide an instantiation of how this ‘horizon’ is marked through the ‘abandonment’ of a ‘life’ mediated by law, the life of the detainee in Guantanamo Bay. For the time being I will persist with explaining why it is necessary to capitalise on the ‘lack of sovereignty’, on the ‘empty place of power’.

For Lefort, when the place of power is empty there is no material Other to ground the community, nor is there a singular incarnation of power as One. What generates a society for Lefort are internal divisions - relations of production, action, exchange ordered by norms and goals (ibid, 226). This is not to say that ‘society’ has lost its religious basis. For Lefort, the theologico-political structure persists in modernity through, among other things, the myth of the ‘nation’ (ibid, 232). Nancy also directs his critique at theologico-political formulations of sovereign power where “Divine creation and royal decision compose its double image: to make or unmake a world, to submit to a will, to designate an enemy” (Nancy, 2000c, 120). Nancy seeks

to undermine the ‘proper’ accomplishment of the “Executive” essence of sovereignty which is presented as the “prince, State, nation, people, fatherland, and so on” (ibid, 121). It is in this way that Nancy claims that sovereignty is purported to have the power of “finishing” – a power of execution that is not subordinated to something else (ibid, 120). But these monistic and transcendent conceptions of sovereignty are undermined when the distinction between ‘Sovereign war’ and ‘police action’ collapses – as with a ‘just war’ against a ‘rogue state’ or ‘bad leader’ by an alliance of sovereigns in the name of human rights, democracy, and the enforcement of international law (ibid, 123-4, 130). The figure of war is becoming the “ambiguous sovereign-slave of economics”(ibid, 111).⁶⁸ This is, then, no longer the heroic, ‘brilliant’ sovereign – but yet there is a “world that does not know how to displace or go beyond sovereignty” (ibid, 123-4). Sovereignty does not manifest a ‘unity’, but the failure to think beyond sovereignty as ‘unity’ – as essence, ground, End etc - persists. The conclusion Lefort draws from his examination of the vacated place of power in modernity also resembles Nancy’s account. According to Lefort, in the schema of the theologico-political:

any move towards immanence is also a move towards transcendence; that any attempt to explain the contours of social relations implies an internalisation of unity; that any attempt to define objective, impersonal entities implies a personification of those entities. (Lefort, 1988, 254)

⁶⁸ Nancy expands this account of the transformation of sovereignty in the post-cold war era through an account of what he terms “ecotechnics”, a term that signifies ‘planetary technology’ and ‘world economy’ (ibid, 133, and see generally 129-136). Nancy interrogates the relationship between “world”, sovereignty, economy, technology and law. It is an account that has much to say about contemporary debates about the nature of ‘globalisation’, but it is beyond the scope of my analysis to take up this trajectory here.

What this highlights is the persistence of an urge to provide a transcendent source of unification for law and society. I wish to bring this questioning to bear on the ‘postcolonial’ context of Australia in the following Chapter.

Before moving to that I should clarify how the impossibility of finitude, the impossibility of a singular ‘position’, monism, or limit that absolutely separates, is applicable to discourses of sovereignty and law. It is beyond the scope of this thesis to recount the plethora of theories on the nature of sovereignty or law. Instead I will recount Bartelson’s thought on ‘sovereignty’ and Fitzpatrick on the nature of ‘law’. I have selected these authors because their concerns resonate with Nancy – each seeks to ‘empty’ the ‘ground’ of sovereignty and law or demonstrate how a singular, monistic conception of the origin is impossible. Bartelson and Fitzpatrick are exemplary reflections of how Nancy’s critique of the finitude of being resonates with more explicit treatments of sovereignty and law. The objective is not to be exhaustive in relating Nancy’s theory to theories of sovereignty and law. Rather, an engagement with theorists that explicitly deal with sovereignty and law will facilitate relating Nancy’s thought, in later Chapters, to other theorists who have grappled with the problem of the sovereign ‘event’ (Derrida) or the exceptional decision that constitutes the law (Schmitt).

1.4 De-positioning Sovereignty

The imperative to move sovereignty to a ‘non-place’ has been articulated by Jens Bartelson in his thoughtful critique of empiricist treatments of sovereignty in ‘international relations’ literature. I will consider Bartelson’s arguments in light of

the impossibility of a finite conception of sovereignty and the imperative to 'empty' the place of the sovereign identified through Nancy's thought. In the next section I will bring Nancy's arguments on the impossible limit that absolutely separates, the impossibility of a determinate 'ground' for being, to bear on law through Fitzpatrick's articulation of the impossibility of a 'position' that can be attributed to law.

The methodologically empiricist account of the source of sovereignty is proposed in two discourses, 'international political theory' and 'macrosociology', both amply set out in Bartelson's *A Genealogy of Sovereignty* (1995, 19-49). Bartelson deploys a Foucauldian genealogical critique against the empiricist accounts. In traditional international political theory, the state is seen as historically and ontologically prior to a system of states (ibid, 23). Sovereignty is the defining property of this state, and as the state is regarded as a necessary condition of the larger system of states, state sovereignty is also an essential pre-condition of the international system (ibid). In this account the emergence of the state is regarded as resulting from the fall of 'primordial political unity' when 'mediaeval Christendom dissolved and the modern sovereign state was born' (ibid). But the 'difference' that historical origin may pose is not allowed to get in the way for long, for "sovereignty is stripped of its historical origin and reinstated ahistorically as an organising principle" (ibid). All states can then be presented as the 'same', presumably provided they escape primordial stasis and make the leap in the direction of modernity. These 'units', now the same, present a sort of ontological international anarchy, an 'absence' which is the ontological partner of sovereignty, a 'prior presence' (ibid, 23-4, 36). Order grows out of this disorder by way of the familiar contractual theories and the 'transposing' of 'natural' conflicts into higher levels of complexity or a different

historical stage (ibid, 24). The 'past', in this account, is explained in terms of the 'present' (ibid).⁶⁹ The 'external order' of international relations is a derivative of the 'internal' sovereignty of the ontologically assumed state.

In 'macrosociology' this approach is reversed. Instead of the 'ontologically unproblematic and primitive entity' macrosociology attempts to elucidate the concept of sovereignty and present an empirical account of its actual formation in time, its consolidation in the European context and global spread (ibid, 35, 36-44). Rather than the state preceding the 'international', the emergence of the state is explained through 'conflict theories' (ibid, 37-8) where the consolidation of states coincide with the emergence of an international sphere (ibid, 36-9). It is suggested that a sphere of social action exists prior to the state. The movement now is from a 'past to a present' where that which precedes the state is regarded as an absence: "Logical and chronological priority [is given] to the notion of society as a kind of anarchical condition, out of which the state emerges as a gradual concentration of power" (ibid, 36-8). 'The state of nature', 'anarchy', and 'order void' are themes repeated by modern macrosociologists. The emergence of the state out of this prior stage is matched by a "concomitant sublimation" to the international level (ibid, 38). Essential to this story of state formation is an 'acting subject' that must be present in order to constitute itself and the state as an 'inside' "that remains identical with itself throughout the formative process, no matter how it is conditioned by 'outside' forces in the course of its historical development from embryo to full blown state" (ibid, 39): The 'unit' or subject that makes such an empirical reference possible is an individual

⁶⁹ For a critique of the Whiggish character of this discourse see Bartelson, 1995, 56-58; and McHugh, 1991, 170.

or collective 'rational will' that will effect the transfer of power from King to people, the presence of an essence that is common to the state and to Man (ibid, 39-40).

However, such a *concept* as 'rational will' present unto itself, sovereignty as an *object* of knowledge, or self-sufficient individual collectivity as acting *subject* that is the driving force of history is anathema to the Foucauldian conception of knowledge and genealogical approach that Bartelson employs. For Foucault:

one has to dispense with the constituent subject, to get rid of the subject itself, that's to say to arrive at an analysis which can account for the constitution of the subject within a historical framework. And this is what I would call genealogy, that is a form of history which can account for the constitution of knowledges, discourses and domains of objects etc., without having to make reference to a subject which is either transcendental in relation to the field of events or runs in its empty sameness throughout the course of history. (Bartelson, 1995, 74)⁷⁰

According to the two empiricist approaches considered by Bartelson the sovereign state is either ontologically prior to the international order, the 'inside' exists before the 'outside'; or 'internal sovereignty' is dependent on something like the anarchical society which is structurally prior to the state that emerges from it. In the latter "sovereignty grows out of absence, and the inside is constituted from the outside" (Bartelson, 1995, 44). The commonality in both versions of the emergence of sovereignty is a conception of sovereignty as unicity with a 'presence' that is discretely 'inside' or 'outside'. Such a finite 'presence', as we observed through Nancy, is impossible. A finite will, subject, or state presumes a spatial separation that

⁷⁰ See Foucault, 1980, 117, cited in Bartelson, 1995, 74. See also, for a critique of knowledge through the presupposition of the subject, Foucault, 1997, 3, 14-5.

is always an exposure across the limit that separates. Bartelson does, however, call into question the possibility of a limit that absolutely separates. He does this through the notion of a 'parergon' which I will now consider.

It is trite to mention that neither 'inside' nor 'outside' can exist without the other. As Bartelson suggests, this impossibility of sovereignty and its other as entirely distinct self-sustaining phenomena may be discerned through the notion of a 'parergon'. 'Parergon' was a concern of ancient writings on art and was reintroduced by Kant when discussing the 'relation of a frame or an ornament to the work of art itself and its background' (ibid, 61).⁷¹ The notion of the 'parergon' has been elaborated by Jacques Derrida in *Truth in Painting* (1978). It is Derrida's elaboration that Bartelson draws on in deploying the notion of the 'parergon' as a means of questioning the 'fixity' or substance of a line that separates 'inside' from 'outside'. The problem of the parergon concerns the relationship of the frame to that which is being framed. The solution is that:

a frame, a line of demarcation, an ontological divide, or a geographical or chronological boundary all assert and manifest class membership of phenomena, but the frame or the line itself cannot be a member of either class. It is neither inside nor outside, yet it is the condition of possibility of both. A parergon does not exist in the same sense as that which it helps to constitute; there is a ceaseless activity of *framing*, but the frame itself is never present, since it is itself unframed. (Bartelson, 1995, 51)

But this 'never present' frame is 'a composite of inside and outside':

⁷¹ Referring to Immanuel Kant, 1951, 61.

it is 'an outside which is called inside the inside to constitute it as inside'. And conversely: it is an inside which is called outside the outside to constitute it as outside. Once brought into being, a parergonal frame 'detaches itself from two backgrounds, but in relation to each it backs into the other'. (ibid, 51-2)

Bartelson uses this notion of parergonality to demonstrate that sovereignty has no fixed reference. 'It' is in constant movement between 'inside' and 'outside' and exists in relation to that which is adjacent to the ground it occupies. Sovereignty has no ontological presence and the notion of parergonality helps to illustrate this. Bartelson suggests that the concept of sovereignty should not be regarded as an implicit ontological concern of contemporary knowledge, and that 'it' should be moved to a "non-place" (ibid, 52). For Bartelson sovereignty is articulated through discourse – it is constantly drawn and redrawn through knowledge. It is through the interplay of knowledge/discourse that the 'domestic' and 'international' are discursively constituted. Changes in knowledge/discourse through history determine the content of the concept of sovereignty (ibid).

The 'non-place' to which Bartelson would wish to move sovereignty arises out of his analysis that sovereignty only has a 'presence' through its discursive construction over time. The absence of any essential content that can be attributed to sovereignty, does not however, mean that the place of the sovereign is rendered 'empty'. The radical potential of Nancy and Lefort's drive to think a 'nonsovereign' or 'empty place' of sovereignty is not to be found in Bartelson's treatment of the concept. The value of Bartelson's work is that he questions the 'presence' of

sovereignty and addresses this critique to influential variations of international relations theory. However, sovereignty as a discursive construct which is in indeterminate movement between inside/outside has its limits. For instance, it does assume that some stable content can be given to sovereignty – for this would be necessary to move ‘it’ to a ‘non-place’. The discursive critique of sovereignty also encourages liberal pluralist agendas that see sovereignty as a construct that can be filled with variable content or made subject to a ‘law’ that will occupy the place of sovereignty – the ‘non-place’ that Bartelson referred to.⁷² Constructivist accounts deploy the indeterminate notion of sovereignty as a means of replacing, renewing and re-inaugurating sovereignty. But these approaches return us to the problem of finitude. Nancy, in contrast, would wish to assert the ontological condition of a sharing – a dis-position of sovereignty whereby it is the failure of any containing limit that is the occasion of community. The sharing that takes place across limits is not a ‘construction’ of discourse but the very condition of a finite limit that must always already be exposed to what is beside it. Furthermore, Nancy’s project extends far beyond the critique of finitude. He undertakes the task of thinking community without ground or essence – not just an assertion of indeterminacy of substance and content that can be attributed to sovereignty. I will contrast Nancy’s approach with attempts to renew and re-inaugurate sovereignty by legal and constitutional theorists who draw on Bartelson (such as Macklem) in the next Chapter.

⁷² In the next Chapter I consider the work of John Borrows, 2002, and Patrick Macklem, 2001, both leading Canadian constitutional scholars who have argued for the renewal of national sovereignty so that it accommodates indigenous sovereignties. For Borrows this renewal must conform to the ‘rule of law’. For Macklem, who expressly relies on Bartelson, pluralising sovereignty is simply a matter of accepting that sovereignty is a discursive construct and giving this construct new content.

1.5 De-Positioning Law

The impossibility of a fixed position which characterises sovereignty can also be attributed to law. The conception of law as a movement between ‘inside’ and ‘outside’ - that law occupies the ‘space of a line’; law occupying the line co-adjacent with both sides not contained in either - is a central argument in Fitzpatrick’s *Modernism and the Grounds of Law* (2001a). For Fitzpatrick, there can be no fixed ‘origin’ or ‘position’ for law. Law is in constant movement between determination and responsiveness to a beyond. Law’s experience of indeterminacy, I wish to argue, is comparable to Nancy’s critique of the impossibility of finite being. Law’s limit is determined by the transgression of a line that it must unceasingly constitute by crossing, by being exposed and communicating with its beyond.

Fitzpatrick’s articulation of the impossibility of a fixed ‘ground’ of law offers important insights into the relationship between sovereignty and law. While in the so called pre-modern era it is ‘myth’ that offers a mediating device for the ‘irresolution’ of the foundation or origin of taboo and the regulation of social practice, in modernity this place of the ‘transcendent’ is occupied by law as the mediating device which offers determination with a putative responsiveness to its beyond.⁷³ In Fitzpatrick’s thought ‘inside’ and ‘outside’ are theorised in terms of a ‘norm’ and its ‘transgression’:

⁷³ For an account of the irresolution of the origin and the putative settlement offered by law, a narrative rendered through Freud’s myth of origin, see *ibid*, 22-36.

[p]ut in terms of Foucault's suggestion 'that transgression has its entire space in the line it crosses', this line could be taken as the limit at which what is 'inside' it continually forms and transforms. For that inside to subsist, the limit has both to mark it inclusively and open it relationally to all that would impinge on and challenge or deny it. The line divides an enclosing presence and a disruptive transgression beyond it. Yet despite and because of the dissociation, each 'side' of this divide is also integral to the other. (ibid, 60)

This illustrates the impossibility of inside/outside, norm/transgression, sovereignty/law, 'being alone', as Nancy put it, and stresses the relation 'in-between' each side of the line that separates. The significance of emphasising the impossibility of a line that could separate 'inside' from 'outside' can be seen through the persistence of this spatial metaphor in the influential accounts of modern law.

Fitzpatrick brings his theory on the impossibility a fixed 'position' that can be attributed to modern law to bear on the canon of modern jurisprudential thought: Hobbes, Austin and Hart (ibid, 93-101). I will not recount the extensive treatment by Fitzpatrick of these positivist accounts of modern law. What is useful for my purposes is to stress the significance of the impossibility of a fixed 'position' that can be attributed to sovereignty or law, contrary to these conventional jurisprudential accounts. 'Position', as we observed through Nancy and we are about to see instantiated by Fitzpatrick in relation to the dominant instances of English jurisprudence, is always already responsive and thus in 'relation' with its beyond.

According to Fitzpatrick, English jurisprudence asserts the autonomy of law through two modes of the "talismanic spatial metaphor of inside and outside" (ibid,

93).⁷⁴ One way is to assume that law is an “integrated whole” that has a localised origin or source in a particular office or entity (ibid). John Austin’s command of the sovereign that must be habitually obeyed is one example of this: law is law existing by “position” (Austin’s term), and “that position was occupied by a ‘determinate’ and independent ‘political superior’ who ‘set’ the law ‘to political inferiors’” (ibid, 95). The second marks a boundary between what is inside law and outside it with reference to “morality, fact, administration, society, territory, and savagery” (ibid). Fitzpatrick argues that such determinate positing of the position of a law giver and law, always requires its other – a responsiveness to a beyond that is spatially conceived. So in Hobbes’s *Leviathan* for instance, the command of the sovereign Leviathan is said to be possessed of a complete power to posit law (ibid, 93). This completeness flows from the dependence and commitment that those who subject themselves to Leviathan must show. Anything less would risk the recurrence and reversion of natural passions – the lawlessness of the state of nature. The absolute character of Leviathan flows from its spatial characterisation as the opposition to its other, the state of nature (ibid). The various ‘natural laws’ and ‘proto laws’ of the state of nature which allows a covenant to be produced in the first place, leaves Leviathan, the power of positive determination, having “responsive regard to where that power came from” (ibid, 94).⁷⁵ The power of the subject to resist Leviathan’s attempt to take the life of the subject, Leviathan’s ‘duties’ to preserve and improve the well-being of the people, the ‘good’ and ‘equality’ demanded of its laws, and the ambiguity of law that suggests that they should be used sparingly, are all aspects of

⁷⁴ Throughout this section the accounts of Hobbes, Austin and Hart are derived from Fitzpatrick (2001a).

⁷⁵ Fitzpatrick provides a telling account of the restrictions on Leviathan which has to be responsive to the extensive list of liberties of the subject, ibid, 94-5.

the responsiveness of Leviathan beyond the harsh determinacy with which it is commonly endowed.

By the time of Austin, the “spatial instancing” of law by Hobbes becomes a “chasmic division of the globe between savage and civilised places” (ibid, 96). The ‘political society’ that habitually obeys Austin’s sovereign is contrasted with society in its natural state, savage society. Fitzpatrick’s point is that the archetypical positivist, Austin, who stressed the singular determinacy of the sovereign as the source of law, could not sustain his ‘political society’ without its negative contrast with a savage one (ibid, 96-7). The same point is devastatingly made in relation to H.L.A Hart. The distinction between Austin and Hart is that the latter insisted that rule governed behaviour does not simply follow from a command, as Austin put it, but that there is an internal and reflective aspect to the obligation to follow rules. Fitzpatrick identifies a litany of instances where Hart contrasts the reflective, rule following society of ‘developed law’, with ‘primitive communities’ regulated by ‘custom’ or ‘primary rules of obligation’ which are not possessed of the advances of societies with ‘secondary rules’ (ibid, 97-99). It is beyond the scope of my inquiry to recount all these instances here. What is relevant is the ‘relation’ with a beyond that is central to the archetypical instances of positive law. The position of law is always already in relation with an other that is disavowed. Thus the unicity of posited law hardly seems to have the quality of certain position.

Nancy’s critique of the finitude of being, as we observed above, also asserts the impossibility of ‘pure’ position or separation. The relation that upsets One sovereignty manifests the problematic of ‘limits’ that constantly face the fact of their

imminent disappearance in the relation to which they are exposed. This is a dynamic that Foucault splendidly explained in his “Preface to Transgression” (1977). As Foucault put it:

[t]ransgression is an action which involves the limit, that narrow zone of a line where it displays the flash of its passage, but perhaps also its entire trajectory, even its origin; it is likely that transgression has its entire space in the line it crosses. (ibid, 33-4)

Whatever the ‘density’ of limit or transgression, each could not exist without the other. “A limit could not exist if it was absolutely uncrossable” for this would amount to an unfathomable stasis (ibid, 34). And “transgression would be pointless if the limits it faced were illusions and shadows” (ibid). Every time transgression crosses the limit it effaces the condition of its own existence (ibid, 35). This is the paradox that Fitzpatrick brings unceasingly to bear on the character of law. For Fitzpatrick, this dynamic is manifested ‘within’ a law which must transgress ‘itself’ in order to be ‘itself’ – to be a law that is ‘responsive’ to its beyond (Fitzpatrick, 2001a, 54-62).

If we were to ask more specifically what gives law its quiddity or substance, for Fitzpatrick it would be the ‘movement’ in-between ‘determination and responsiveness’ which “in-forms” law (ibid, 70). Law coheres ‘in itself’ through a movement in-between the determinant and the responsive (ibid). Law is not entirely autonomous or independent for it has to respond to that which lies beyond the rule. The rule is never an absolute position (determination), as what is beyond it must be gathered or brought within its purview. Fitzpatrick brings the impossibility of experiencing death, the impossibility of autonomously experiencing finitude, as Nancy articulated it, expressly to bear on the impossibility of law’s autonomous

position (ibid, 100). Death is the “horizon of the law” (ibid) in the same way that being could not experience its own finitude. The impossibility of experiencing death is the instance of an opening to what is beyond an affirmed, autonomous, self-sustaining position. In an idiom that is consistent with Nancy, Fitzpatrick states:

law is tied to the irresolution of the horizon – the horizon both as a condition and quality of law’s contained being and the horizon as opening onto all which lies beyond that being. These dimensions of law are integral to each other.
(ibid)

Law cannot respond to a beyond without a position from which to respond (ibid, 73). However, such a ‘beyond’, as we observed in his treatment of Hobbes, Austin and Hart, is a prerequisite for law’s own ‘position’. The relation of law to its limit is thus explained through its inextricability from what is beyond such a limit. Fitzpatrick emphasises the failure of law’s “assured determination which creates the very demand for law” (ibid, 102). The failure of an autonomous position that can be attributed to a law-giving sovereign or posited law is the occasion of law’s relation to a beyond. This beyond is what a unitary conception of sovereignty or autonomous notion of law cannot be separated from. That is, the failure of such finitude, as we observed through Nancy, is the occasion of community. Community cuts into the monism of sovereignty and the autonomy of law in a variety of ways that I will explore in the next two Chapters.

* * *

This Chapter identified the finite and infinite character of sovereignty in *Mabo*, and considered this as a problematic that can be interrogated through the thought of Jean-Luc Nancy’s critique of finitude. We observed that Nancy

persistently argues that a 'limit' that separates absolutely is impossible. A 'limit', according to Nancy, is a 'relation' - a 'being with' and 'sharing'. The impossibility of finitude, of sovereignty as One, is the occasion of community. Community as 'sharing', 'being with', or 'being in common', is an exposure (a communication) that takes place through the failure of an absolute 'limit' that separates. There can thus be no 'One', no absolute ground, no essence of community, no calculation, not even an 'inclusive exclusion' that ought to determine and regulate community. Community is the instance of the failure of 'ground' and 'essence'. Nancy's critique of finitude thus offers several insights for evaluating the attempt to inaugurate a 'postcolonial' law and society of the 'future' while retaining the contradictory lineaments of a finite and infinite concept of sovereignty that is largely attributed to an 'event' in the 'past'.

To outline how the argument progresses - in the next Chapter I will elaborate Nancy's critique of the 'finitude of being' as a basis for understanding the relationship between sovereignty, law and 'political community'. I have resisted introducing the notion of 'political community' thus far so as not to encumber the elaboration of the impossibility of finite and infinite conceptions of sovereignty. However, at numerous points in the discussion the impossibility of finitude and infinity was characterised as the occasion of an exposure that is the instance of community. I also emphasised Nancy's persistent concern to refuse an 'essence' or absolute 'ground' of community. The discussion in the next three Chapters will extend these insights. In *Chapter Two* I will return to consider the problem of community as it is presented in the 'postcolonial' context - the focus will mainly be on Australia, but reference will also be made to the problem of 'postcoloniality' in Canada. In *Chapter Three* the question of the relation between sovereignty and law will be generalised by considering the

habeas corpus cases that pertain to the detainees in Guantanamo Bay Cuba. The treatment of these cases, despite their seeming disparity to the ‘postcolonial’ context has already been explained in the Introduction. As I noted, the seeming disparity only serves to dramatically indicate that the issue of the in-finitude of sovereignty is not confined to departing from a colonial ‘past’, the particular situation of indigenous people, or the production of a ‘postcolonial’ law and society. The problematic of the in-finitude of sovereignty is of more general significance. Moreover, consideration of the *habeas corpus* cases brings the centrality of membership in ‘political community’ when grappling with the in-finitude of sovereignty, into sharper focus. Legal decisions in relation to sovereignty are articulated through the spatial, territorialised notion of ‘jurisdiction’. These decisions seek to position and re-position law in relation to sovereignty. The ‘subject’ caught up in these sovereign and legal distributions, whether that be the proper(tied) ‘native’ or the ‘unlawful combatant’, have their status determined by law’s regulation of ‘political community’. The notion of ‘jurisdiction’, I will argue through Nancy, is a notion that manifests the relation between sovereignty, law and the political. Finally, in *Chapter Four*, I will bring my analytic of in-finite sovereignty to bear on contemporary accounts of imperial sovereignty as they relate to ‘worldwide’ authority. The *de-positioning* of sovereignty in Chapters 1-3 is confined to ‘national’ sovereignty and law. However, no treatment of sovereignty can be complete without treating the ‘international’ or ‘global’ manifestations of the problematic which I have posed as the in-finite ‘position’ of sovereignty. What are the implications of characterising sovereignty as in-finite or as ‘Nothing’ when numerous theorists claim that a new mode of imperial sovereignty manifests itself as ‘worldwide’ authority (Nancy, 1997; Hardt and Negri, 2000, and

2004)? Confining my treatment to the imperial manifestation of sovereignty, once again, I will argue that 'worldwide' sovereignty is an im-possibility.

CHAPTER 2

De-Positioning 'Postcolonial' Law

[I]t is not possible to say, as was said by Marshall CJ of the Cherokee Nation, that the aboriginal people of Australia are organised as a '*distinct political society separated from others*', or that they have been uniformly treated as a state.... The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised.

Mason CJ, *Coe v The Commonwealth* (1993) (emphasis added)⁷⁶

Fanatics have their dreams, wherewith they weave
A paradise for a sect; the savage too
From forth the loftiest fashion of his sleep
Guesses at
Heaven....

John Keats, *The Fall of Hyperion: A Dream* (1819)

The Australian court in *Mabo*, and *Coe v The Commonwealth* (No. 2) which followed hotly in its wake, insisted on the unicity of 'political community'. Such a unitary conception of 'political community' deploys monistic conceptions of sovereignty and One law (of the State) as the ground of "political society" (Coe (No. 2), 1993, 115). Unitary conceptions of sovereignty and law refuse the possibility of plurality and thus of the very possibility of a 'postcolonial' society. In this Chapter the manner in which the Australian courts delimit and regulate community will be discussed. The regulation, that is to say the determination of the very existence of indigenous community is undertaken through the courts' administration of the notion of 'tradition and custom'. The existence of indigenous community is made subject to a 'measure' administered by the courts. Additionally, the allocation of indigenous rights and the regulation of indigenous social organisation are undertaken through the

⁷⁶ Mason CJ in *Coe* (No. 2) (1993), referring to Marshall CJ in *Cherokee Nation v State of Georgia* (1831).

insistence of One jurisdiction to 'manage' the social and economic deprivation experienced by indigenous people. I will argue that the insistence of One jurisdiction is a 'carrier' of a monistic conception of sovereignty. The impossibility of such monism, the essential plurality of being, is the insistence of a 'postcolonial' community to come. The Australian approach will be compared with the approach advocated by some Canadian constitutional theorists whose approach to a plurality of normative systems has been to suggest a 'legal' ground for a 'new sovereignty' or the allocation of a subordinate form of sovereignty for indigenous people. In both cases, I argue, a monistic conception of sovereignty is retained. The attempt to inaugurate a postcolonial law and society encountered in the Australian and Canadian contexts presents a more generalisable problem of One jurisdiction as the expression or 'carrier' of sovereignty. Thus I will close the Chapter with a discussion of Nancy's treatment of the notion of *jurisdiction*. I will argue that political community is 'co-present' with sovereignty and law and that this 'co-presence' is manifested in the notion of jurisdiction. This discussion will open lines of inquiry into attempts to confine sovereignty as jurisdiction in contexts other than 'postcolonial' societies discussed thus far.

In this Chapter there will be an insistence that the 'political' is not a substance or substantial entity. This refusal of the 'essence' of the 'political' is best made through a discussion of attempts to inaugurate a 'postcolonial' community, recognise a 'traditional Aboriginal community', or grant legal protection to a 'subject' whose membership of the 'people' is a condition for a life mediated by law. I would also emphasise that the treatment of the 'political' in this Chapter is preliminary and directed at interrogating the attempt to re-inaugurate a 'postcolonial' law and society

in settler societies like Australia and Canada. A more thoroughgoing treatment of the ‘political’ will be undertaken in *Chapter Three* of this thesis where I will examine the notion of the ‘political’ in the context of the *habeas corpus* cases on the detainees in the United States Naval Base in Guantanamo Bay, Cuba. This latter context presents problematics, such as the relation between sovereign War, law and jurisdiction, which cannot be easily extracted from ‘postcolonial’ contexts. Moreover, the question of jurisdiction in relation to Guantanamo Bay offers the opportunity to extend my argument into areas characteristically associated with a sovereign assertion but not covered in the situations of the ‘postcolonial’ considered in the first two Chapters. The sovereign exception and its relation to law, the problem of ‘democracy’ as a delimited space patrolled by a sovereign, and the ‘essences’ of citizenship and subjection by which life is mediated by law are matters crucial to examining the possibilities of vacating or ‘emptying’ the place of sovereignty – an imperative that follows from the critique of sovereignty undertaken through Nancy in *Chapter One*.

I should, however, provide a preliminary account of what I mean by the ‘political’ when I use the phrase ‘political community’. The question of the ‘political’, as with sovereignty, is a problem of the ‘limit’. Indeed, as Lacoue-Labarthe and Nancy explain it, the ‘political’ is a problematic constituted by the concepts of ‘people’ and ‘sovereignty’ (Lacoue-Labarthe and Nancy, 1997, 115-6).⁷⁷ The ‘people’ and ‘sovereignty’ are questions of the ‘limit’ to the extent that they are staged as a ‘closure’ (ibid). There is a ‘measure’ for membership of the ‘people’ as

⁷⁷ Lacoue-Labarthe and Nancy insist that a re-treatment of the ‘political’ must take place through an examination of the “co-belonging” of the philosophical and the political (ibid, 109). This is a questioning of the relationship between *logos* (as a relation) shared in-common and the ‘social bond’ that is presented in the city, *polis*, civilisation, political community etc. That is, they wish to call into question *logos* as the philosophical ground of the *polis*. It is the presentation of an ‘essence’, as *logos* for instance, as the ground of community that they wish to discredit. As we observed in the previous Chapter, it is the ontology of a singular-plural relation that Nancy would use to characterise existence.

‘race’, ‘ethnos’, or civilised ‘humanity’. Who are the ‘people’?; who is ‘proper’ to a ‘people’?; which collectivity is entitled to ‘sovereignty’? - are questions determined through an ‘essence’.⁷⁸ There are qualities of ‘statehood’ that purport to determine when it is ‘proper’ to designate a collective that occupies a finite territory a sovereign state in international law (Crawford, 1979). The political is also deployed in the common-place ‘everything is political’ – a “blindingly obvious” notion from which Lacoue-Labarthe and Nancy would wish to “withdraw” the notion of the ‘political’ (Lacoue-Labarthe and Nancy, 1997, 112). The ‘political’ is also a question of ‘space’ and the ‘spacing’ of being (Nancy, 1993a, 75).⁷⁹ In Nancy’s critique of the finitude of being we observed the impossibility of being One – a singular being cannot ‘be alone being alone’. The ‘relation’ this implies has no ground, no foundation. Existence as relation is the ‘co-appearance’ of being. In his thought on freedom, Nancy stresses that “existence as the sharing of being” takes place in a “political space” which is not a space for guaranteeing freedom - for instance through a community of natural right, ‘humanity’ or ‘equality’ - but in a space of the ‘political’ which is a “spaciocity” that cannot be determined by any “measure” (ibid. 71-5). Rather than being determined by a ‘measure’ (humanity, equality etc), freedom and the political (as the sharing of being) must measure itself against “nothing” (ibid, 71).⁸⁰ This nothing is an “excess”,

⁷⁸ Aristotle’s opening teleological assumption that “every state is an association, and that every association is formed with a view to some good purpose” leads him to proclaim the state, the “most sovereign of associations”, as the entity that pursues the “most sovereign of all goods”, “the political”, see Aristotle, 1981, para. 1252aI. The ‘political’ immediately raises the question of what determines membership. What cohering force or essence will form the ‘we’ of a particular political community? Carl Schmitt’s opening assertion in the *Concept of the Political* is: “The concept of the state presupposes the concept of the political”, Schmitt, 1996, 19. A decision on the contours of the political thus precedes the state.

⁷⁹ Nancy’s thought on freedom is a deeply philosophical, reflecting and replying to the thought of Hume, Kant and Heidegger - but which is beyond the scope of my purposes to recount here. See generally, Nancy, 1993a, and Nancy, 2003b.

⁸⁰ A more comprehensive discussion of sovereignty as ‘Nothing’, and the refusal of a ‘measure’ for political community will be considered at length in *Chapter Four*. Sovereignty as ‘Nothing’ is the limit point of thinking sovereignty. I foreshadowed this in *Chapter One*, and it seems apt to deal with it fully at the end of the thesis once the problem of the finitude of sovereignty and its relationship to law and the ‘political’ has been elaborated in the intervening Chapters.

a *démesure* (ibid). The ‘political’ as the ‘space’ of the ‘sharing’ of the plurality of being should have no absolute ‘measure’, no determination by ‘essence’. I will now contextualise these claims about the ‘political’ through the notion of the stable ‘nation’ and ‘traditional Aboriginal community’ that were deployed in *Mabo* as the elements that conditioned or delimited law’s attempt to inaugurate a ‘postcolonial’ law and society in Australia.

2.1 Finite Sovereignty and ‘Postcolonial’ Political Community

In Australia the attempt to inaugurate a ‘postcolonial’ political community was dealt with through two devices: the stability of a ‘nation’, and the insistence on an authentic ‘native’ determined by the continuity of Aboriginal ‘tradition and custom’. These devices manifest the insistence on ‘unity’ and ‘essence’ of a political community as a means of re-positioning a now abhorrent ‘colonial’ sovereignty. How does ‘political community’ facilitate the positioning and re-positioning of sovereignty in relation to law? The Australian High Court’s response to indigenous claims for justice was regulated by the imperative of maintaining the stability of ‘one’ political community, the Australian ‘nation’, and ‘one’ law as the ‘law of the land’. The recognition of indigenous law and custom and the existence or absence of indigenous community were subordinated to preserving past ‘sovereign’ decisions that usurped sovereignty, appropriated land, and established a legal order and political community.

An exemplary instance of the significance of ‘political community’ for understanding the relationship between sovereignty and law may be gleaned through the two elements that regulated the recognition of native title in *Mabo*. The first is the

significance of the ‘peace and order of Australian society’ as the factor that regulates (sets limits) on the extent of justice that may be granted to indigenous people. As Brennan J put it:

The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. (*Mabo*, 30)

The limits of justice (and thus of law’s responsiveness to the ‘previously’ marginalised) is determined by the need to maintain the stability of ‘Australian society’ and its legal system. It is no surprise, however, that ‘Australian society’ is not given any content as such. Indeed, it is clear from previous decisions of the High Court, including cases such as the *Seas and Submerged Lands Case* which greatly informed *Mabo*, that the Court cannot clearly assert what the ‘nation’ is or when it came into existence.⁸¹

The second element that regulates justice in *Mabo* is the determination of the continuity or not of ‘traditional indigenous community’ (*Mabo*, 59-60). Indigenous communities must be sufficiently ‘traditional’ though without elements that would be “repugnant” to the common law in order to benefit from the common law’s

⁸¹ See *New South Wales v The Commonwealth (Seas and Submerged Lands Case)* (1975). In this case Stephen and Gibbs JJ dissented, but their decisions on the nature of sovereignty and ‘act of state’ influenced Brennan J’s reasoning in *Mabo*, 31. A nation state, it seems, can be a power unto itself even before it achieves the status of ‘nation’ in international law. The Commonwealth is ‘by the Constitution, endowed with the capacity to take its place as a nation state’ (per Stephen J, *Seas and Submerged Lands Case*, *ibid*, 444). But this is initially “an *inchoate* capacity to act and be recognised as an international person” (*ibid*). While it is the case for both Stephen and Gibbs JJ that ‘for the purposes of international law, Australia is now a sovereign state’ (Stephen J, 444; Gibbs J, 385), the ascent to this status of a state with international personality is a gradual, and indeterminate phenomenon. Indeed, none of the judges are clear about when, what they are now certain of, that Australia is a state in international law, took place:

“At the time of federation the Commonwealth was not an independent nation – not a person recognised by international law. That remained the situation until after the First World War – probably until after the Imperial Conference of 1926. At federation, and until the Statute of Westminster, the Commonwealth had no more power to enact legislation having extra-territorial operation than did any State”. (Gibbs J, *ibid*, 408).

He is referring here to the States of the Commonwealth of Australia. See also, Stephen J at 444.

recognition (ibid, 61). By deploying 'Australian society' or 'acceptable tradition' as the factor that limits legal responsiveness, the overarching political power of 'one sovereignty', 'one law' and the homogenising drive of a 'civilised society' is reiterated in the name of justice and human rights. It is through this assertion and regulation of political community, I want to argue, that a monistic sense of sovereignty and the limits of law are instantiated. These assertions about the significance of 'political community' for re-positioning sovereignty call for further elaboration.

2.1.1 The 'Postcolonial' Through a Proper(tied) Community

In *Mabo* the complex problematic of sovereignty and its relationship to law and political community is converted into a question of proprietary rights (native title). According to the Court the colonial sovereign acquired title to the territory but not absolute property in the land. This is wrought (with no sign of irony given the task at hand was to inaugurate a 'postcolonial' law and society) by reinvigorating the English feudal system of land tenure in which a distinction is drawn between 'title' to territory held by the sovereign and 'possession' of land either by the sovereign or anyone else (43-52).⁸² The attempt to graft a 'postcolonial' law and polity out of Australia's brutal colonial history is purportedly accomplished by recasting the indigenous inhabitants as proper(tied) subjects. The proprietary interests in land of the native inhabitants (native title) are now recognised as a species of title that is a burden on the radical title of the Crown. The incidence of native title, though determined by Aboriginal 'traditional law and custom', is subject to the continuity of

⁸² Fitzpatrick provides a more nuanced account of the 'feudal' notion deployed in *Mabo*, see Fitzpatrick, 2002, 241.

such 'tradition and custom' being recognised by the common law.⁸³ Native title is thus subject to the recognition of the common law, providing it has not already been destroyed by sovereign appropriation and alienation (the grant of freehold tenures for instance). Granting property rights to the natives, rights which were apparently always already there, is the means by which a 'postcolonial law' based on a colonial foundation attempts to redeem itself. But this renewal is regulated by yet another imposition, this time by 'postcolonial' law. The principles for recognition set out in *Mabo* insist that the 'tradition and custom', which determines the incidence of native title, be sufficiently continuous with 'tradition and custom' at the time sovereignty is asserted. So recognition by the common law depends on the natives being sufficiently native.⁸⁴ A 'traditional community' must exist in order to sustain 'traditional law and custom. This is another sense (in addition to the 'peace and order of the Australian 'nation') in which 'political community' sits between colonial sovereignty and 'postcolonial' law and society. Let me explain this further.

Despite the High Court's attempt to turn the question of sovereignty into a question of title to land, the 'postcolonial' moment cannot be confined to the recognition of the natives' antecedent property rights. Both colonial and 'postcolonial' law insist on a community whose essence is announced and regulated by law. Colonial law viewed the native as 'barbarous and without a settled law' (37-8). 'Postcolonial' law seeks the barbarous savage in order to include her. As noted above, 'postcolonial' law calls on the two modes of regulating and regularising political community. There can be no change to the consequences of the colonial assertion of sovereignty (the recognition, now, of native title) unless this renewal of

⁸³ More detailed examination of cases which illustrate this point follow below.

⁸⁴ In the next section I will discuss the notorious case of *Yorta Yorta v Victoria* (1998) where this insistence had its most insidious manifestation.

law and society is 'delimited' or regulated in some way. The delimitation of the 'postcolonial' moment is contingent on what is deemed favourable to maintaining the 'peace and order of Australian society'. 'Postcolonial' inclusion and recognition is also contingent on the 'natives' being members of a sufficiently 'traditional' community.

The *position* of a colonial sovereign and its law was refashioned in *Mabo*. Australian law, Brennan J insistently declares, "is free of Imperial control" (ibid). The following assertion is deployed to sustain this: "The law that governs Australia is Australian law" (ibid). Thus there is a re-positioning of Australian law in relation to the enterprise of the imperial sovereign and its courts. The reason given for this re-positioning is the emergence now of a post-racist political community that seeks justice and respects human rights. Brennan J announces a post-racist nation whose "people" (42) now respect the "values of justice and human rights" (30). The sovereignty of this renewed nation is itself positioned in a wider legal and political frame, for the courts must respond in accordance with the "expectations of the international community" (42). The response to indigenous claims for justice thus renews and purportedly re-inaugurates a 'nation' and its 'people'. The concomitant of this repositioning of sovereignty and law is the common law's recognition of 'traditional' Aboriginal interests. However, only the factual incidence of native title is to be determined by indigenous traditional laws and customs (58-63).⁸⁵

⁸⁵ A 'primitive', 'sacred' law will determine the nature and incidence of native title. But the common law will determine the continuity and acceptability (repugnance) of the sacred in the modern, ibid, 61. I will return to this latter point when I examine the Australian cases more closely below. This point has been well made by Ken Gelder and Jane M. Jacobs (1998).

The difference between a colonial sovereign operating on racist assumptions and a 'postcolonial' law is cast explicitly through the sovereign/legal acts of dispossession. There is a 'difference', a separation, asserted between colonial sovereignty and the 'postcolonial' law that now recognises 'native title'. The conception of sovereignty deployed in *Mabo* must be both finite and infinite. A finite sovereignty is attributed to the establishment of the colony and an infinite quality is attributed to its ever 'present' effects – the dispossession of indigenous people by 'acts of state'. The 'difference' between colonial sovereignty and 'postcolonial' law is recognised by Brennan J as manifesting itself in relation to community: the dispossession of indigenous peoples "underwrote the development of the nation" (69). What's more, this is not a matter for which 'law' is responsible or accountable. Dispossession is the (now) disavowed practice that enables the separation between colonial sovereignty and 'postcolonial' law:

As the *Governments of the Australian colonies* and, latterly, the *Governments of the Commonwealth, States and Territories* have alienated or appropriated to their own purposes most of the land in this country during the last two hundred years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the *Crown's exercise of its sovereign powers* to grant land to whom it chose *Aboriginal rights and interests were not stripped away by operation of the common law* on first settlement by British colonists, but by the exercise of sovereign authority over land exercised recurrently by Governments. (68, emphasis added)

According to this formulation, the injustice of the appropriation of land cannot be addressed by the common law. The common law, it is asserted, cannot call these sovereign, governmental decisions into question. The impossibility of such a clear

separation between sovereignty and law is precisely what my enquiry calls into question.

As we observed through Nancy's critique of finitude, the 'limit' that separates is 'shared' with its 'outside'. Colonial sovereignty cannot be contained as the absolute ground that established law and a 'nation' 'back then'. Colonial sovereignty, the 'acts' of dispossession, cannot be separated from 'postcolonial' law's acceptance of these appropriations of land. As we observed in the passage from *Mabo* quoted above, law 'positions' itself as being 'outside' these 'sovereign' appropriations. But this 'finitude' of sovereignty fails precisely because the sovereign acts cannot be delimited as taking place in the 'past'. The authority and consequences of sovereign acts reach into the present. These sovereign acts also condition the limits of a 'postcolonial' future. Therefore, the impossible finitude of colonial sovereignty calls into question the very 'postcoloniality' of Australian law and society.

2.1.2 The 'Essence' of a Proper(tied) Native

Recall the non-justiciability of the colonial assertion of sovereignty discussed above as one instance of the impossible finitude of sovereignty. To this can be added the separation between the Crown's sovereign power to grant land and law's inability to scrutinise and hold this power accountable.⁸⁶ While the 'Australian common law'

⁸⁶ The common device by which law deals with compulsory acquisition of land by governments is 'compensation'. Following *Mabo*, the Labour Government passed the *Native Title Act* 1993. This was a hasty compromise reached between the Government and some indigenous leaders which validated the extinguishment of 'native title' prior to the enactment of the *Racial Discrimination Act* 1975. In effect all racially discriminatory appropriations of indigenous proprietary interests prior to 1975 were retrospectively validated by the *Native Title Act* 1993. This legislation also introduced a scheme to provide compensation for 'future acts' that extinguish native title.

is busy absolving itself of responsibility for dispossession, the effect of the doctrine of extinguishment it articulates on indigenous law and custom is terminal:

since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it [sic]. ... Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been *substantially maintained*, the traditional community title of that clan or group can be said to remain in existence. ... However, when the tide of history has washed away any *real acknowledgement* of traditional law and any *real observance* of traditional customs, the foundation of native title has disappeared. A native title that has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition [sic]. (60-1, emphasis added)

This passage contains several of the most violent gestures and inaccuracies by which the continuity of the colonial usurpation of indigenous land was reinforced in *Mabo*. For instance Brennan J begins by acknowledging the fact of the forced removal of Aboriginal people from their lands. The consequences of this removal on indigenous law and custom are its alteration or 'disappearance'. The courts then draw the conclusion that indigenous people have 'lost' their laws and customs – a conclusion that is terminal for indigenous community and the recognition of their proprietary interests in land.

Though aboriginal traditions must only be observed as 'far as they are practicable', they have to conform to standards of 'real acknowledgement' and 'real

observance'. These standards are applied by the coloniser's courts. Povinelli argues that this substitutes the notion of 'culture' for the "older version of race" whereby "Aboriginal culture interbred with another "heritage" to some undefined degree" it forfeits its antecedent rights (Povinelli, 2004, 164). Or as Borrows has so poignantly put it in relation to the Canadian cases that established a similar regime for regulating aboriginal rights, judges are deciding what it means to be Aboriginal: "Aboriginal is retrospective", it means "once upon a time" (Borrows, 2002, 60).⁸⁷ With this notion of cultural purity which in the discourse of multiculturalism is rendered as 'distinctness', Aboriginal community, law and tradition is thrown into a process of having its 'presence' determined by sovereign acts and their legal consequences.⁸⁸

Aboriginality and 'native title' are made subject to several determinative 'essences'. There is the assertion of the 'presence' of 'One origin' for law and society. The Crown asserts that it has title to the territory and the common law becomes the 'law of the land'. Far from emptying the 'place of sovereignty', it is given a finite and infinite quality. There is also an 'essential' notion of tradition and custom which may 'disappear'. The incidence of native title is to be determined by traditional laws and customs "provided those laws and customs are not so repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld" (61). There are thus several 'essential' grounds for 'postcolonial' law and community deployed in *Mabo*: the colonial assertion of sovereignty that is retained (as the foundation of the common law) and disavowed because of the 'new' civilised standards that promote justice, 'human rights', and the

⁸⁷ Discussing Lamer CJ in *R v Van der Peet* [1996].

⁸⁸ See Povinelli, Ch. 4, generally, for a rich, critical discussion of *Mabo*, *Wik* and subsequent cases examined in the context of transnational discourses of postcolonialism and multiculturalism.

recognition of the previously marginalised. Rather than the necessary ‘dis-position’ of origins that we observed through Nancy, *Mabo* retains ‘One origin’ for law and society, and merely adjusts law’s recognition of proprietary interests within one united, ‘civilised’ society that respects human rights. This recognition is also made subject to the essential qualification of a ‘proper’ tradition that must not be repugnant to ‘natural justice, equity and good conscience’. I will now turn to consider the specific instances where an ‘essential’ notion of ‘tradition and custom’ has been deployed in native title cases that have followed *Mabo* in Australia.

The most notorious example of the insistence of an essential ground of community as the precursor to recognition of native title rights and interests is the case of *The Members of the Yorta Yorta Aboriginal Community v State of Victoria*.⁸⁹ Justice Olney, the trial judge in this native title application, found that the claimants had lost their ‘character’ as a ‘traditional Aboriginal community’ (ibid, para. 128).⁹⁰ Given this loss of ‘traditional’ character, the claimants failed to demonstrate that they held rights and interests in accordance with traditional laws and customs. This conclusion was reached through the application of principles set out in *Mabo*. Here I will provide a brief account of how the case was decided. Justice Olney summarised what he believed to be the elements, as they were set out in *Mabo*, that a claimant group must establish in order to make out a claim for native title (ibid, para. 3-4). It is worth setting these out serially:

⁸⁹ *Yorta Yorta Aboriginal Community v The State of Victoria* (1998) 1606 FCA. This was the first application to come to trial after the enactment of the *Native Title Act* 1993. It was lodged in 1995 and was finally determined by the High Court in December, 2002. The decision of Olney J, the trial judge, was appealed to the Full Court of the Federal Court which upheld him in a majority of 2-1. The Full Court decision was appealed to the High Court which, although varying some elements of the test applied by Olney J, dismissed the appeal. The consequence is that the Yorta Yorta Aboriginal Community were not successful in establishing any native title rights and interests.

⁹⁰ For a useful summary of the Full Federal Court’s consideration of this issue and the High Court’s confirmation of these findings, see the High Court decision of Gleeson CJ, Gummow, and Hayne JJ, *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002], paras. 16-27.

- The claimant group, whether they are a clan, community or otherwise, must show that they are the descendents of indigenous people who occupied the claim area prior to the assertion of Crown sovereignty;
- The nature and content of traditional laws and customs acknowledged and observed in relation to traditional land must be established;
- The claimants must demonstrate that a traditional connexion with the land has been “substantially maintained” since the time sovereignty was asserted;
- Once all this is established, the claim will be subject to whether the rights and interests are those of a kind recognised by the common law of Australia.

(ibid, para. 4)

As earlier mentioned, the weight placed on the existence of traditional laws and customs is separate to the fact that native title can be ‘validly’ extinguished by other sovereign acts. It is only if the land claimed has not already been alienated by sovereign acts that a ‘community’ may attempt to meet the elements set out above for establishing native title.

It is widely acknowledged, including in *Mabo*, that indigenous communities were forcibly displaced from their traditional lands during the process of colonisation. Violent struggles at the frontiers of settlement, and later, the forced assimilation of indigenous people has led to the ‘adaptation’ and transformation of traditional norms and customs. The central contentious issue in the *Yorta Yorta* decision, then, was whether the claimant group, the Yorta Yorta Aboriginal Community, could be said to possess traditional laws and customs that have a recognisable “continuity” from the time of the assertion of colonial sovereignty. Olney J concluded that there was no such continuity:

The evidence does not support a finding that the descendants of the original inhabitants of the claimed land have occupied the land in the relevant sense since 1788 nor that they have continued to observe and acknowledge, throughout that period, the traditional laws and customs in relation to land of their forebears. The facts in this case lead inevitably to the conclusion that before the end of the 19th century the ancestors through whom the claimants claim title had ceased to occupy their traditional lands in accordance with their traditional laws and customs. The tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs. (ibid, para. 129)

What is evidence of ‘traditional’ community? What qualities and characteristics must a community possess in order to be sufficiently ‘traditional’? The conclusions reached in relation to these questions were based on privileging written “history” – the amateur observations of a “squatter” (the term used to signify a colonial settler in Australia) - over the oral history of the claimant group.⁹¹

⁹¹ Olney J privileged the writing of a squatter over the oral history of the claimants: “The most credible source of information concerning the traditional laws and customs of the area from which Edward Walker's and Kitty Atkinson/Cooper's [claimants] early forebears came is to be found in Curr's writings. He at least observed an Aboriginal society that had not yet disintegrated and he obviously established a degree of rapport with the Aboriginals with whom he came into contact. His record of his own observations should be accorded considerable weight. The oral testimony of the witnesses from the claimant group is a further source of evidence but being based upon oral tradition passed down through many generations extending over a period in excess of two hundred years, less weight should be accorded to it than to the information recorded by Curr”, ibid., para. 106. I will shortly point out what Curr’s evidence amounted to.

Edward M Curr, was one of the first squatters to occupy land in the claim area. Curr’s two books were - *Recollections of Squatting in Victoria: Then Called the Port Phillip District (From 1841 to 1851)*, (published in 1883), and a four volume work entitled *The Australian Race: Its Origin, Languages, Customs, Place of Landing in Australia and the Routes by which it Spread itself over that Continent*, first published in 1886. The High Court decision of Gleeson CJ, Gummow and Hayne JJ, point out that this was part of the written material tendered by the applicants – a practice that is adopted, ironically given its consequences in the present case, as such ‘historical’ material is deemed necessary to establish ‘traditional law and custom’, (2002) para. 59.

I will recount the most insidious aspects of this evidence. The Court insisted that rights determined by ‘tradition and custom’ require ‘traditional’ natives. I will shortly recount the courts reasoning and then consider how the High Court incorporated this account of ‘tradition’ into its version of the relationship between sovereignty, “pre-sovereignty normative systems” and what it termed ‘society’.⁹² The *Yorta Yorta* case, from first instance to the final dismissal of the applicants’ claim in the High Court, is indicative of the general point I wish to make in this section – that an ‘essential’ ground of community, given content in native title cases through the notion of ‘traditional law and custom’, is central to maintaining a finite, monistic conception of sovereignty. The colonial assertion of sovereignty which purportedly displaced the existing normative system asserts itself in native title cases as the One law of the land. The assertion of this One law, One jurisdiction, is central to maintaining the singular and unitary sense of sovereignty – despite the common law’s claim that a ‘postcolonial’ law and society has emerged from the ‘age of racial discrimination’.

The treatment of ‘tradition’ in the *Yorta Yorta* case goes something like this: ‘they were wasteful savages then and now they are caring/sharing environmentalists – they must not be traditional’. Olney J concluded that the claimants were no longer ‘traditional’ by comparing their current practices with those of the past:

With regard to their practices relating to the use of food resources, Curr wrote
(*Recollections*, p 262):

⁹² *Yorta Yorta v Victoria* (2002) paras. 37-57. The joint reasons of Gleeson CJ, Gummow and Hayne JJ are regarded as the leading judgment. They dismissed the Yorta Yorta Community’s application. McHugh and Callinan JJ wrote separate judgments and also dismissed the application. Guadron and Kirby JJ dissented in a joint judgement that allowed the appeal. For a useful account of the Federal and High Court decisions in *Yorta Yorta*, see Anker (2004).

It is a noteworthy fact connected with the Bangerang [the ancestors of the Yorta Yorta community], ... that as they neither sowed nor reaped, so they never abstained from eating the whole of any food they had got with a view to the wants of the morrow. If anything was left for Tuesday, it was merely that they had been unable to consume it on Monday. In this they were like the beasts of the forest. To-day they would feast - aye, gorge - no matter about the morrow. So, also, they never spared a young animal with a view to its growing bigger.

And at p 263:

I have often seen them, as an instance, land large quantities of fish with their nets and leave all the small ones to die within a yard of the water. (*Yorta Yorta*, 1998, para. 115)

There is no effort to demonstrate why these particular practices stand out as 'traditions' or more pertinently, the traditional *laws*, of the 'past'. Nonetheless, Olney J compares the practices observed by Curr with the practices of the present:

Another contemporary practice which is said to be part of the Yorta Yorta tradition is the conservation of food resources. A number of witnesses gave evidence that they hunt and fish on the land and in the waters of the claim area and to some limited extent, gather "bush tucker" for their personal consumption. Of these activities fishing appears to be by far the most popular but is currently engaged in as a recreational activity rather than as a means of sustaining life. It is said by a number of witnesses that consistent with traditional laws and customs it is their practice to take from the land and

waters only such food as is necessary for immediate consumption. This practice, commendable as it is, is not one which, according to Curr's observations, was adopted by the Aboriginal people with whom he came into contact and cannot be regarded as the continuation of a traditional custom. (ibid. para. 123)⁹³

The 'essence' of Aboriginal Community is reduced to a bundle of practices that must demonstrate some continuity between the present and the past. There is no determination of whether the particular practices have a sufficiently 'normative' quality so that they amount to traditional *laws* or customs. The "significant adaptation" (*Yorta Yorta*, (2002), para. 44) that had taken place was sufficient to signify the death of tradition. The relationship between traditional laws of a community and the existence of One normative system after the assertion of sovereignty was, however, a key plank in the High Court's confirmation of Olney J's approach.

2.1.3 Pre-Colonial Normative Systems – The Dead Weight of the Past

In *Fejo v Northern Territory* (1998) the High Court articulated the relationship between native title held in accordance with traditional laws and customs, and the common law's recognition of those rights, as the "intersection" of laws (traditional and common law) (*Fejo* (1998), 128). In *Yorta Yorta* this metaphor of 'intersection' was expanded or clarified further (*Yorta Yorta*, (2002), 39ff). *Yorta Yorta* confirmed

⁹³ The slippage between laws and customs manifest in this passage is dismissed by the High Court in *Yorta Yorta* (2002). Though informed by the positivism of Austin and Hart, the High Court refrain from expressing a firm view on whether 'tradition and custom' amounts mere habitual behaviour. As we will see below, the possibility that 'traditional law amounted to a normative systems tied to the existence of a 'society' that can sustain such normativity: *Yorta Yorta* (2002) para. 41. For a useful discussion of the High Court decision see Anker (2004).

that what was not intended in *Mabo* or *Fejo* was a *plurality* of laws whereby the 'native' normative system would continue to generate laws and customs, after the assertion of colonial sovereignty, that may be recognised by the common law. Instead, traditional law is the 'dead weight' of the past. Gleeson CJ, Gummow and Hayne JJ put it thus:

Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign. (ibid, 43)

There can be no parallel law making systems. To hold otherwise, the judges tell us, "would be to deny the acquisition of sovereignty" (ibid, 44). The concomitant of One sovereignty is One law. Recognition is only accorded to rights and interests that existed at the time sovereignty was acquired. If the (traditional) normative system on which the rights and interests are based ceases to exist, then neither the rights and interests or the system on which it is based can be reconstituted (ibid, 47).

The continuity of traditional laws and customs is determined by a circular formulation where continuity is dependent on the existence of a 'society' which in turn is determined by its 'unification' by laws and customs. There can be no 'traditional law' without a 'traditional society' and *vice versa*. The key determinant of the existence of 'traditional law' is a loosely defined idea of "society" that needs to have continued from the time of the change of sovereignty: "society is to be

understood as a body of persons united in and by its acknowledgement and observance of a body of law and customs” (ibid, 49). Laws and customs are “socially derivative” and ‘society’ is the entity unified by laws and customs (ibid).⁹⁴ This unification, in the case of the native, cannot be revived after it has lapsed or be newly created:

In so far as it is useful to analyse the problem in the jurisprudential terms of the legal positivist, the relevant rule of recognition of a traditional law or custom is a rule of recognition found in the social structures of the relevant indigenous society as those structures existed at sovereignty. It is not some later created rule of recognition rooted in the social structures of a society, even an indigenous society, if those structures were structures newly created after, or even because of, the change in sovereignty. So much necessarily follows as a consequence of the assertion of sovereignty and it finds reflection in the definition of native title and its reference to possession of rights and interests under traditional law and custom. (ibid, para. 54)

Thus the monistic conception of sovereignty deployed by the High Court in the key native title cases, *Mabo*, *Fejo*, and *Yorta Yorta*, insists on a singular normative order as the source of indigenous rights and interests. According to the High Court in *Yorta Yorta*, ‘social structures’ are the source of norms such as ‘traditional laws and customs’. Adopting H.L.A Hart’s nomenclature of the ‘rule of recognition’ (Hart, 1997, Ch. 6), the judges state that the condition for the existence of norms is a particular ‘social structure’ or ‘society’. Once colonial sovereignty was asserted, the

⁹⁴ The Judges quote Julius Stone, *The Province and Function of Law*, (1946) at 649: laws and customs are “socially derivative and non-autonomous”. The circularity in the formulation, as far as I can gather, is contributed by the High Court.

new sovereign may recognise the antecedent rights and interests of the indigenous population providing that population ‘substantially’ maintains its traditional connection with the land, and providing such observance accords with a ‘real’ acknowledgement and observance of traditional custom (*Mabo*, 59-60). What is ‘real’ tradition and custom is determined by the coloniser’s law. In the case of Australia and other settler societies recognition has tended to be retrospective. This legal recognition apparently reflects the emergence of a ‘society that now respects universal human rights’ (ibid, 42). However, the attempt to inaugurate a ‘postcolonial’ law and society involves the reassertion of a singular ‘normative system’, as the High Court put it in *Yorta Yorta*. Moreover, the normative system of the unified ‘postcolonial’ nation will not allow a parallel normative system, even an indigenous one.

In the previous chapter I discussed the impossibility of a finite sovereignty which, through the exposure of its limit, is the condition of community. I also argued that sovereignty could not be infinite – its absolute ‘timeless’ character is disrupted by the need to adjust the ‘event’ ‘back then’ to the ‘post-racist’ aspirations and conditions of the present. However, the ‘postcolonial’ law and society of the present, as we have observed in the native title cases discussed above, insists on a singular normative order of the One sovereign ‘nation’. A plurality of normative systems and ‘social structures’ has been treated as disrupting the singularity of the assertion of sovereignty and the One ‘law of the land’ it purportedly established. In the next two sections of this Chapter I will move to undermine this insistence of a singular sovereignty and law – a questioning of the very possibility of such singularity – through an examination of how this singular conception of sovereignty and normative

order manifests itself as ‘jurisdiction’. I will argue, through Nancy, that a ‘unitary’ conception of jurisdiction is an impossibility.

In the preceding sections of this Chapter I identified the ‘essential’ grounds for law and ‘political community’ that flow from the finite and infinite character attributed to sovereignty. I have argued that the court’s treatment of sovereignty as finite and infinite calls into question the very ‘postcoloniality’ of Australian law and society. An ‘essential’ ground for determining community, I have argued, flows from the courts treatment of sovereignty as both finite and infinite. I now wish to move the discussion towards generalising the observations made about the impossibility of a finite or infinite conception of sovereignty. In the following two sections I will develop a critique of the ‘unity’ attributed to sovereignty, law and ‘political community’ by interrogating the notion of *jurisdiction*. ‘Jurisdiction’ is a notion that Nancy has used to examine the relationship between sovereignty, law and political community in order to undermine the possibility of their presence as a ‘unity’. ‘Jurisdiction’ is the *event* of sovereignty, legal order, and political community.

2.2 Sovereignty and the (Il)Legality of Jurisdiction

Jurisdiction, as Dorsett and McVeigh elaborate it, suggests a relation between a sovereign event, territory, land and the limit point of law: “The formula that the sovereign is, in a sense, both beyond and part of the law, also articulates the inaugural topological gesture of jurisdiction as it delimits the law” (Dorsett and Mcveigh, 2002, 291). Jurisdiction is a gesture of enunciation - it gives voice “to sovereignty and to the order of *nomos*” (ibid, 298). The sovereign event, as Dorsett and McVeigh put it

drawing from Agamben, is “at once an ordering (*Ordnungen*) of space and a localisation (*Ortung*)” (ibid, 291). The question raised by them in relation to *Mabo* is why jurisdiction and a monistic conception of sovereignty are equated? Why is a plurality of jurisdictions not recognised? This questioning goes to the heart of what is at stake in democratic renewal and reconciliation in ‘postcolonial’ societies. For instance, in the Canadian context, constitutional theorists advocate recognition of multiple, divided sovereignties which reflect a plurality of normative orders as the basis for a ‘postcolonial’ law and society (Macklem, 2002, Ch. 4). I will examine some of the leading arguments below. The point of this engagement, for my purposes, is to demonstrate that the assertion of a ‘plurality’ of sovereignty and law, the discourse of legal pluralism as the response to ‘difference’, does not overcome the violence of a monistic conception of sovereignty in the colonial context. Indeed, the most that is advocated through these discourses is ‘second’ or ‘third order’ self-government in a federal system that does not disrupt ‘national unity’ or ‘territorial integrity’ (ibid, 123). A monistic conception of sovereignty, where ‘collectivities’ are ‘united’ within the ‘nation’ and organised through ‘essentialised’ grounds of community pervade much of this discourse.

By the close of this Chapter, I hope to have demonstrated that Jean-Luc Nancy offers a far more nuanced means of understanding the problem of sovereignty as it relates to the notion of ‘jurisdictions’ in the ‘postcolonial’ context. Mere plurality of authority in the organisation of governance hardly addresses the deeper problematic of a finite conception of sovereignty. The point I wish to make here is that the plurality of law and community – the ‘difference’ for which liberal constitutional theorists seek a means of recognition – cannot be produced by making law and

community subject to a 'proper' origin or the 'unity' of the 'nation'. Plurality of sovereignty, law and community is an 'exposure' to a co-presence in which neither term of this triad can be the ground of the other. A sufficiently critical account of sovereignty must have regard to the failure of grounds - the impossibility of finitude elaborated in the previous Chapter. Indigenous claims to self-determination continue to be made because, at an ontological level, the sovereign 'absolute' fails to be absolute. Finitude, as we saw through Nancy, is always already a 'sharing'. In what follows I consider the problem of inaugurating divided sovereignty and a plurality of law in the 'postcolonial' context. I will then consider Nancy's thought on jurisdiction.

The 'unities' by which sovereignty is (re)presented in 'postcolonial' societies – nation, state, people, community of human rights etc – conceal the violence of the sovereign event in the phantasm of democracy. The Will of the colonial sovereign establishes a new juridico-political order that is later democratised. The sovereign Will then takes the form of popular sovereignty – the 'will of the people' purportedly replacing the 'exceptional' Will of the colonial sovereign. The re-treatment of the sovereign event, one that becomes necessary in determining/explaining the colonial acquisition of sovereignty as the foundation of a 'postcolonial' law, resurrects the question of what force and violence lies beneath the democratic polity and its law. Is sovereignty the finite force beyond legality that 'comes first', animating and actualising law and political community? Is 'One' sovereignty which purportedly inaugurated a legal order now capable of being the reflection of a plurality of legal orders? That is, can a normative system be grounded on a new normativity? Rather than rehearse the traditional jurisprudential debates about the nature of rules and their

source, I will consider these questions through the problematic of ‘postcoloniality’ and law.

2.2.1 Lawful Sovereignty and a Plurality of Law?

Indigenous peoples demand justice for the denigration of their traditional laws and customs, destruction of their communities, and appropriation of their lands. Can a legal system, based as it is on a violent foundation, but regarding itself as ‘postcolonial’ and thus willing to respond to some of these claims for justice, be renewed and redeemed by a re-inauguration through law? This is the question that legal theorists I consider in this section have answered affirmatively. However, I will call into question the affirmation of a ‘proper’ origin through law. The key difference between the Canadian scholars I examine and my approach to ‘postcolonial’ sovereignty is the ‘voluntarism’ in inaugurating a ‘just’ law that the former seem to assume, and the impossibility of escaping the arbitrary and excessive qualities of sovereignty that feature in my analysis. Apart from that crucial difference the problematic defined and addressed by John Borrows *Recovering Canada* (2002) and Patrick Macklem in *Indigenous Difference and the Constitution of Canada* (2001) mirror the attempt in Australia to inaugurate the ‘postcolonial’ juridical order and polity by disavowing a ‘finite’ (imperial) sovereignty that took place back then.

In the previous Chapter I outlined Fitzpatrick’s argument that no ‘fixed position’ can be attributed to law. Given law is a combination of ‘determination and responsiveness’ it is not able to take “any consistent position or positing” (Fitzpatrick, 2001a, 78). Attempts to re-inaugurate sovereignty by making it conform to law – the

attempt to ‘properly’ originate law – fail because of the impossibility of a fixed ‘position’ that can be attributed to law. The origin, as Fitzpatrick explains through Derrida’s account of the ‘paradox of iterability’, has to be repeated ‘originarily’ (be preserved as an event that took place ‘back then’), and also be adjusted to be the origin of what is now (ibid). The ground of law is thus an ‘unending formation’ (ibid, 79). A ‘proper’ origination of Canadian law is precisely what is proposed in the courageous and imaginative book by Borrows (2002). The problem is also dealt with by Macklem (2001) who calls for a plurality of normative systems.

As with Australian courts after *Mabo*, Canadian courts have used the notion of ‘underlying title’ or ‘radical title’ to describe the type of ownership and control that the Crown acquires over a territory. Radical title, it is worth noting, has also been described as ‘jurisdiction’. In *Mabo*, Toohey J quoted the noted Canadian scholar on native title, Kent McNeil, to the following effect:

The blurring of the distinction between sovereignty and title to land should not obscure the fact that:

‘[t]he former is mainly a matter of jurisdiction, involving questions of international law, whereas the latter is a matter of proprietary rights...’... (Mabo, 108)⁹⁵

This distinction between law’s jurisdiction established by the ‘one’ sovereign and proprietary interests in land is one that Borrows would wish to shatter. What Borrows and Macklem seek, in different ways, is recognition of a plurality of normative frameworks, a plurality of jurisdiction. In contrast, courts in Australia and Canada limit justice to the recognition of the antecedent proprietary rights of indigenous

⁹⁵ Citing Kent McNeil, 1989, 108.

people. The existence of these rights is 'reconciled', as part of the 'postcolonial' process, with the monistic conception of sovereignty asserted by the Crown. The jurisdiction of the legal system established by the sovereign assertion is not called into question in state-sponsored discourses on reconciliation.⁹⁶ Reconciliation of Aboriginal society and Crown sovereignty can only take the form of property rights held by an appropriately 'traditional' native.⁹⁷ Challenging the compromise that features in the distinction between title to territory and title to land, Borrows argues that courts that "unquestioningly support notions of underlying Crown title and exclusive sovereignty in the face of contrary Aboriginal evidence" do not "respect the constitution's rule of law" (Borrows, 2002, 116). According to Borrows, and this is consistent with the claims of indigenous communities dispossessed by colonial expansion throughout the world, courts have uncritically accepted "Crown proclamations to the effect that sovereignty and underlying title to land throughout the country belongs solely to Canada despite the presence of an unextinguished prior and continuing legal order" (ibid, 112-3).

Borrows' strategy for undermining and reconfiguring this monistic conception of sovereignty is to subject sovereignty to the 'rule of law':

A faithful application of the rule of law to the Crown's assertion of title throughout Canada would suggest that Aboriginal peoples possess the very right claimed by the Crown. According to the Supreme Court of Canada, the *rule of law* consists of two interrelated legal principles: *it precludes arbitrary*

⁹⁶ In Canada this conception of reconciliation is articulated in s. 35 of the *Canada Constitution Act 1982 (Charter of Rights and Freedoms)*, and elaborated in the decision of Lamer CJ in *R v Van der Peet* [1996]. For an excellent critique of this see Borrows, 2002, 58-61.

⁹⁷ A critique of this approach to the 'distinctive' culture/race of the native was undertaken in the previous section in relation to the court's reasoning in relation to *Mabo*. Much the same critique can unsurprisingly be levelled at Canadian native title law which has been one of the keys sources of concepts applied in the process of 'postcolonial' recognition in Australia.

state power and requires the maintenance of a positive legal order. (ibid, 113, emphasis added)

Borrows characterises the Anglo-Europeans' assertion that the colonial sovereign has underlying title to the land as an example of 'arbitrary power'. The usurpation of Aboriginal sovereignty by this assertion is also regarded as arbitrary. Arbitrariness is also to be found in Aboriginal people having their status redefined by the state of Canada without "persuasive judicial reasoning" (ibid, 117). To the extent that reasons were given by colonial powers, these have not proved to be 'legitimate' bases:

The Supreme Court has not effectively articulated how, and by what legal right, assertions of Crown sovereignty grant underlying title to the Crown or displace Aboriginal governance. Doctrines of discovery, terra nullius, conquest, and adverse possession have all been discredited in the common law and in international legal systems as legitimate bases to dispossess aboriginal people of their land. (ibid)

It is true that the reasons for the assertion of sovereignty are no longer, if they ever were, persuasive. But the central question is whether the establishment of a legal order can ever be legitimate and free of violence? Can the assertion of sovereignty 'back then' be reconditioned 'now' so that it accords with contemporary legal values? According to Borrows it can be. Canadian laws are invalid because their "arbitrary, non-legal foundation violates the first principle of the rule of law" (ibid, 119). They may remain "operative until they can be fixed by the federal Crown, negotiating with First Nations to place Crown sovereignty in a workable, but *proper, legal framework*" (ibid, emphasis added).⁹⁸

⁹⁸ In a footnote Borrows points to the Nisga'a treaty as one model for creating this 'proper legal framework', n. 47, 247. The Nisga'a Final Agreement, May 2000, provided for Nisga'a ownership and use of lands and resources in British Columbia. It set out a new relationship between Federal,

My argument is that such a ‘proper’ legal framework for sovereignty can only be brought about by rendering sovereignty ‘finite’ – an event that took place ‘back then’, and one that is thus capable of disavowal. We observed that such a process of rendering colonial sovereignty finite was deployed in the Australian ‘postcolonial’ context. To that extent Borrows is on the right track. However, the conditions and criteria by which a ‘finite’ sovereignty is ‘adjusted’ are hard to predict or discipline in advance. What for instance will be the (permissible) pragmatic limits that determine such an adjustment – the argument that the ‘stability’ of the juridical and social order must not be compromised (as we saw in *Mabo*)?

The second condition of the ‘rule of law’ violated by the colonial assertion of sovereignty, according to Borrows, drawing from the definition of the rule of law of the Canadian Supreme Court, is the ‘maintenance of a positive legal order’. What is meant by this is the “creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order”.⁹⁹ For Borrows the “near anarchy and constant strife within Aboriginal communities” is the result of the stifling of the creation and maintenance of Aboriginal normative orders (ibid). The Crown’s assertion of sovereignty is thus contrary to the rule of law because it “destroys the normative orderliness within Aboriginal communities” (ibid, 119). The solution according to Borrows is that “Aboriginal normative orders be facilitated by recognising their powers of governance” and that Canadian laws “continue in effect until the parties correct the invalidity by *grounding Crown title*

Provincial and Nisga’a laws within the Nass Area. This includes the administration of justice and local policing.

⁹⁹ *Reference Re Language Rights Under s. 23 of the Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 (Manitoba Language Reference)*, [1985] 749, as cited in Borrows, 2002, 118.

and sovereignty on a sound, substantiated legal foundation” (ibid, emphasis added).

Such a foundation would require a finite colonial sovereignty that can be grasped and discarded in favour of another finite sovereignty. The re-inaugurated sovereignty would have to be ‘finite’ once again as it would need to be grasped and substantiated by a law that could operate independently – that is, a law ‘outside’ the sovereignty it substantiates.

Borrows’ book is an articulation of the meaning of justice for Aboriginal peoples if the precepts of a liberal legal order are taken seriously and carried to their logical limit. The arguments made by Borrows are indicative of a political project that seeks to remain optimistic about renewing society through law. Law is presented as capable of *infinite* responsiveness to claims for justice. This approach is contingent on the possibility of rendering sovereignty *finite*, and a fixed ‘position’ that can be attributed to law. Such fixity combined with responsiveness to a beyond is possible, as we observed through Fitzpatrick and Nancy above. The brutal assertion of colonial sovereignty “back then” would have to be contained *and* cast off. The foundation of a new political community of ‘reconciled’ sovereignties and laws would have to take place in a time/space separated from the ‘event’ of the colonial assertion of sovereignty and its reiteration by ‘postcolonial’ law. Moreover, law would have to be capable of originating the present and a future for which it would have to be adjusted. Law would have to be imbued with the contradictory elements of fixed position to originate the present and be capable of a malleability, a non-fixity, by which it would be the origin of a future. While all this is possible, and on my account has taken place in the Australian ‘postcolonial’ context, the adjustment was arbitrarily subordinated to what judges determined to be conducive to the stability of the political community of

the nation state. It is not clear why a more desirable outcome would be delivered by (another) 'legal' adjustment of the past.

Macklem begins his treatment of indigenous claims to self-government by adopting a conception of sovereignty as a discursive construct (Macklem, 2001, 108-112).¹⁰⁰ Rather than one meaning being attributed to sovereignty, its meaning is said to be a function of interpretative acts by those who possess and seek sovereignty (ibid, 108). Sovereignty is "a contested site of interpretation, it remains open to transformation and application to diverse forms of human association" (ibid). The key reason for protecting and constitutionally recognising a form of sovereignty for indigenous people is that the 'grant' of sovereignty to a "collectivity permits that collectivity to express its collective difference" (ibid, 110). Indeed, 'collective difference' "is in fact a precondition of such recognition" (ibid, 111) (no timidity about essences here!). Sovereignty is valuable to a community because it establishes a "legal space" for a community to "construct, protect and transform" its collective identity (ibid). Highlighting the obvious circularity, then, a sovereign community would already have to exist in order to be recognised as a 'collectivity', though being a 'collectivity' is a condition of being recognised as a sovereign community. The 'ground' occupied by a collectivity would already have to define it and separate it out from 'other' collectivities. A collectivity would already have to occupy the 'position' that gives it substantial 'presence'. The paradox raised by Macklem, but also arising

¹⁰⁰ It is worth noting here that Macklem purports to adopt Bartelson's treatment of sovereignty – see Bartelson, 1995, discussed in *Chapter One* above. However, Bartelson offers a far richer account of the nature of sovereignty than as a mere discursive construct. As we observed in the previous Chapter, for Bartelson the nature of sovereignty is intimately connected with the conceptualisation of the 'limit'. He adopts Kant's notion of the 'parergon' as a frame that is not clearly outside or inside what is being framed. This 'sharing' of the limit resonates with Nancy's treatment of the impossibility of limits, though there are significant differences between Bartelson and Nancy on sovereignty, as I pointed out.

out of Borrow's attempt to inaugurate a new order, can be expressed and amplified through Derrida.

The question of the 'people', the law they have in 'common', and the authority of the 'Will' that articulates their 'presence' is a problematic taken up by Derrida in a number of texts. But here, for the purposes of dealing with the problem expressed but not tackled by Macklem, "Declarations of Independence" appears apt for discussion given its direct interrogation of the appearance of a 'people' and their law through a claim to inaugurate a sovereign state, the United States (Derrida, 1986). The paradox of sovereignty and representation of the United States Declaration of Independence is posed by Derrida as the question of "who signs, and with what so-called proper name, the declarative act which founds an institution?" (ibid, 8). It is a question that seeks an elaboration of the *nothing* or nowhere from which a juridical order springs. Derrida disrupts any linear account of cause-effect through the "rumbling" that affects all concepts such as "act, performative, signature, the 'present' and 'we'" that purport to author(ise) a new order, society, or state (ibid, 8). The question of the relationship between 'Will' and representation is posed thus:

The declaration which founds an institution, a constitution or a State requires that a signer engage him- or herself. The signature maintains a link with the instituting act, as an act of language and of writing, a link which has absolutely nothing of the empirical accident about it. (ibid, 8)

Derrida's engagement is with the "instance"¹⁰¹ of the founding event, of the instance as foundation, but an instance that cannot be separated from coming into existence *within itself* (ibid, 8).

The question 'who signs?' is not just a question of mediation and representation. "In the first instance", in a manner of speaking that does not say nearly enough about the event of the foundation, there must have been a people whose place is taken by representatives ("the representatives of the United States in General Congress assembled"), the proxies who sign on behalf of the "good people ... of these independent states" (ibid, 9). These representatives are in turn represented by Jefferson, the 'draftsman' (ibid, 8). The "good people" declare themselves through these representatives to be free, but:

one cannot decide – and that's the interesting thing, the force and the coup of force of such a declarative act – whether independence is stated or produced by this utterance. (ibid, 9)

Not only do they declare themselves to be free, they also *declare themselves*. The 'people' do not exist 'as such' before the declaration. And so:

if it gives birth to itself, as free and independent subject, as possible signer, this can hold only in the act of the signature. The signature invents the signer. This signer can only authorize him- or herself to sign once he or she has come to the end [parvenu au vout], if one can say this, of his or her own signature, in a sort of fabulous retroactivity. (ibid, 10)

This 'coup of writing', the invention of the subject by the signature, the giving to itself of a 'proper name', coming into existence by the marking of a sign, is "the coup

¹⁰¹ see endnote 3, ibid, 8: the semantic range of the French word 'instance' includes "agency, acting subject, effecting force, insistence, tribunal or place of judgment".

of force [that] makes right, founds right or the law, gives right, *brings the law to the light of day, gives both birth and day to the law*" (ibid, original emphasis).

Returning to Borrows and Macklem, now, it is precisely this 'coup' and 'force' of inauguration that they fail to account for in their call for a 'new' law or divided sovereignty. The reform advocated by Macklem is that sovereignty be treated as a 'thing' which has a 'malleable nature' that can be divided-out in accordance with the exigencies of 'postcolonial' justice (ibid, 124). A community (of 'difference') that can make a just claim to a 'piece' of sovereignty is a precursor to its recognition as a sovereign community. What 'coup' will produce the 'people' that can appoint the 'representative' to sign the signature that will usher in the 'postcolonial' juridical order and political community? And what of the other communities in the pluralist order? The 'difference' that separates 'immigrant', and 'slave-descendent' communities from 'indigenous' communities thus becomes another 'essential' ground for the allocation of sovereignty to indigenous people but not the other 'others' (ibid, 128-131).¹⁰² This selectivity produces yet another mis-recognition. The 'coup' and the 'force', then, lie in separating out the worthy 'victim' who will command the new 'postcolonial' order.

The questions arising out of Borrows and Macklem's arguments in relation to Canadian 'postcolonial' law and my discussion of the Australian 'postcolonial' context can be generalised as follows. In what way is law's *jurisdiction* – law's becoming 'operative' and applying to territory or subjects/citizens - a sovereign event

¹⁰² A variety of liberal constitutional theorists base their articulations of 'postcolonial' recognition of special indigenous rights on 'essential' difference. I will not rehearse all the liberal accounts here. See, for a notorious example which privileges 'indigenous difference' over other 'difference', Will Kymlicka (1995).

that is connected to a conception of ‘political community’? To what extent can law and political community become operative *and* remain separate from a sovereign violence that is the condition of their actualisation? Does the sovereign occupy a position apart from law and community, or is it capable of being conditioned by law and new societal values such as the newly discovered respect for human rights in the Australian polity? I will take up these questions in the next section through an account of Nancy’s treatment of the co-presence of sovereignty, law and the political.

2.3 Jurisdiction as the Co-presence of Sovereignty, Law and the Political

The juridical, the province of law’s authority, is a question of jurisdiction in more than one sense. At the level of law’s day-to-day operation, there is the question of what territory, subjects, space/time (for instance with questions of retrospectivity, responsibility and judgement) will be mediated by a particular law. At a more fundamental level the juridical is also a question of what commands the law – what actualises or conditions its ‘presence’. This latter sense is precisely the question that colonised populations have posed in relation to the coloniser’s law. Both these senses raise the question of law’s authorisation – a question that manifests itself in every legal decision and thus cannot be separated as the day-to-day operation of law distinct from the violence of law’s foundation. In this section I want to establish that the relation between ‘sovereignty, law and the political’, is one that can be abstracted and discussed as a question of ‘position’ and ‘relation’. We have already undertaken this questioning through Nancy and Fitzpatrick above. Here I wish to elaborate Nancy’s thinking on ‘jurisdiction’. This will set the scene for generalising the

problematic of the ‘position’ of sovereignty in relation to law in contexts other than the ‘postcolonial’ legal contexts that I have discussed in the preceding two Chapters.

Jean-Luc Nancy poses the question of position and relation between sovereignty, law and the political in the following way:

How do things stand with respect to the minimal articulation of the *actualisation* of the law [*droit*] – not of its execution or its application as a practical or material process, but of the *decision* that makes the law effective? This decision itself is an act of law. But it is not in the order of the generality of the law; it inheres in the order of the particularity of its employment [*mise en oeuvre*]. (Nancy, 1993c, 110, original emphasis)

This ‘employment’ for Nancy is “nothing other than that of the social institution as such” which requires “right [*droit*]” not as “an instrument of regulation but as that by which the social institution recognises itself or “symbolises” itself reflexively (that is to say, institutes itself)” (ibid, 110-11). In this formulation we already see a rudimentary sketch of the possible co-presence and being-in-relation of sovereignty, law and the political. The ‘articulation of the actualisation of the law’ takes place through a ‘*decision* that makes the law effective’. This ‘decision’ is not the act of a sovereign whose plenitude is assured as the entity that posits the law – Nancy explicitly distances himself from a ‘decisionist’ problematic (ibid, 111). How do sovereignty and law become actualised? I will argue through Nancy that the relation between sovereignty and law is rendered operative through the ‘political’.

How is the juridical rendered operative through the political? At play in this question is not only the doublet of the juridical and political but also their relation to

sovereignty. What cannot be asserted with any confidence is which of the triad ‘sovereignty, law and the political’ comes first:

The political articulates with the juridical at this point [through right (*droit*)] as the latter’s *operative implication*. But since the law is such only if it declares and decides itself actually as the actual law of such and such a collectivity, the juridical articulates itself equally well at this point to the political, as to its own *instituting condition*: a double articulation which, one could show is that of the *sovereign* and of the *prince* in Rousseau. It is in general the articulation of the judgement that decides as to the law, of the judgement that pronounces legitimacy as such (ibid, 111, original emphasis)

The actualisation of the political and the juridical are articulated by the sovereign. But such actualisation is itself in need of law, right (*droit*), at the moment of origin (ibid). Nancy develops this formulation of the relationship between sovereignty, law and the political through a discussion and critique of the “union” of the monarch, State, and ‘people’ in Hegel’s philosophy.¹⁰³ The monarch is for Hegel:

neither the substance, nor the finality, nor the foundation of the State; nor is he either its right or its power. But he is *all that at once insofar as he is absolutely - but only - the “at once” of all that*. He is the co-presence of the elements of the State and of the moments of its Idea (institutions, powers, and persons), as this organic co-presence itself, that is to say, as an actual presence, the *Da-sein* of the political, of the essence of the political *existing* in and as this *zoon*. (ibid, 115, original emphasis)

For Hegel the monarch is the “existence of sovereignty”; a “self-determination with no foundation”; and an “ultimate element of decision” (Nancy quoting Hegel,

¹⁰³ See the section titled “The Monarch the Whole of the State”, ibid., pp.114-118. While I do not propose to engage with Hegel’s thought as such in this thesis or provide a full account of Nancy’s nuanced reading, it is apt that I set out a brief outline of how Nancy develops his argument.

references omitted, *ibid.*, 116). The problematic that Nancy poses in relation to the *existence* of the political as co-present with the person of the monarch in Hegel's thought is the question of the "actualisation" of the political as such (*ibid.*, 17-18).¹⁰⁴ What gives content to the 'union' that has its existence in the person of the monarch who is 'at once' co-present with the political?

According to Nancy there are two ways in which the content of the 'union' in Hegel can begin to be envisaged. The first is the "position" of the monarch which is manifested as "law", "posited right" or *jurisdiction* (Nancy, 1993c, 119), and the second is the "relation" between monarch, State, and people, which Nancy, in contradistinction to Hegel, examines as a limit question, rather than "relation in an architecteological unity" (*ibid.*, 121). The monarch as "the existence of the union as such of the people" (*ibid.*, 119) presents the existence of free will and its recognition: "the *law* [*das Gesetz*] is [the content of this truth] *posited* [*gesetzt*] for the consciousness of intelligence with determination as a power having validity" (Nancy quoting Hegel, *ibid.*, references omitted (original emphasis)). It is this positing or "position" of right that is "juris-diction" (*ibid.*). Considering "relation" (of consciousnesses, subjects, States, people) as a limit-question, Nancy takes up the challenge (including in texts other than the "The Hegelian Monarch"¹⁰⁵) "of thinking relation without origin and without realisation in a substantial unity" (Nancy, 1993c, 130).

¹⁰⁴ This is a question that Nancy has explored at considerable length in several essays. I will only mention one other example here. In his lengthy essay "Of Being Singular Plural" (2000b) 24-5, Nancy argues that philosophy understood as the subject of the city, taking place in the city, and as a communication of essences between *logos*, community and humanity seeks a common origin that can be the foundation of philosophy as politics in the 'fullest sense', a unity to which it can have no access. The co-presence of the 'decision', the people, institutions of the State in the person of the Hegelian monarch represents such a unity. This is why "philosophical politics and political philosophy regularly runs aground on the essence of community or community as origin", *ibid.*, 24.

¹⁰⁵ In particular see Nancy, (1991).

Nancy problematises the 'position' of the sovereign as a "singularity" (ibid, 131). The jurisdiction of the monarch presupposes the unity that is the place or territory of 'right' and the accomplishment of a 'people'. Once the purported 'unity' is reached, the role of the sovereign becomes a "formal manifestation or presentation" of the unity of 'right' and people (ibid). However, this formality is immediately contradicted by the fact that the sovereign enunciates the "substantial actuality" of the "decision" which institutes the totality/unity by the sovereign's "name", "signature", and "mouth" which says the "I will" that constitutes "the saying of the law" (ibid). This 'decision' is "infinitely undecidable: it adds nothing and it adds itself" (ibid) – it "inaugurates all activity and actuality" (ibid, 132). The decision manifests a "performative" – "The monarch is the subject of the enunciation, while the people – the spirit of the people – is the subject of the statement [*énoncé*]" (ibid). But as the enunciation by the sovereign brings the 'people' into existence as the subjects of 'right' whose being-in-relation is mediated by law, the 'law' that is actualised always contains a "residue" that cannot be accounted for through its enunciation or actualisation. The 'position' of the sovereign, then, harbours a *contra-diction* in the process of enunciating and actualising "juris-diction" (ibid, the last phrase is Nancy's and the emphasis is his). The questions Nancy then poses are these: "Is the voice in general, and the voice of sovereign jurisdiction in particular, definitively indivisible, atomic? Would it not be already divided when it enunciates [itself]?" (ibid, 137). This questioning leads to an undoing of the singularity of the sovereign:

And the singularity of the proper name is never, as we know (as Derrida knows), singular enough not to be iterable. As an absolute singularity, the monarch fits also into absolute iterability, or better, he *is* exactly, juridically

and exactly iterable and interchangeable. Which means that his jurisdiction is absolutely “democratic” in a nonconstitutional sense of the term. (ibid, 139)

There is thus a “rupture” between the totalising aspect of the sovereign (the sovereign of the State as ‘unity’ and being-in-relation of the ‘people’) and the individuality and singularity that he is supposed to represent. This rupture is opened by the fact that the ‘relation’ the sovereign represents is incomplete – it is never accomplished absolutely. The iterability of the sovereign’s enunciation of the ‘law’ and the ‘people’ *depositions* the singular, monistic quality attributed to it. This resonates with Fitzpatrick’s treatment of law as not occupying a fixed ‘position’ which was discussed above.

To recap, then, for Nancy, “the term “jurisdiction” contains the motif of the declaration that decides and, in its modern sense, the motif of the actual power of the law” (ibid, 111). He calls this “articulation *political jurisdiction*” (ibid, original emphasis). The Will of the sovereign enunciates the decision that actualises the conjunction ‘political-jurisdiction’ as the event of a ‘juris-diction’. The purportedly singular sovereign is supposed to accomplish this through the sovereign’s position apart from the juridical and the political. However, this separation is also a ‘relation’:

the separation does not *signify*, it distances, and in this sense it inscribes.

What it inscribes is the finitude of relation. Relation is in finitude because it is incompleteness. (ibid, 140-41)

By questioning the *position* of the monarch and re-opening the question of *relation*, Nancy suggests that ‘political jurisdiction’ must be rethought so that it no longer involves submission to a “Subject”, or a “Symbolism” (such as a flag) (ibid, 142). Rethinking ‘political jurisdiction’, and the position of the sovereign must involve a re-

conceiving of relation and “the trace of its separation” (ibid). Nancy’s thought draws attention to the possibility of deconstructing the finitude of position and substance usually attributed to the sovereign, state, people or the law of a collectivity. Attention to *position* and *relation* when considering the actualisation of the triad ‘sovereignty, law and the political’ serves as a means of undermining any sense in which each term might have a substantial ‘presence’ or a singular existence.

* * *

In this Chapter I extended the critique of sovereignty as neither finite nor infinite which was developed in *Chapter One* by considering how such finite (monistic) or infinite (absolute) conceptions of sovereignty are maintained through the insistence of a unitary ‘political community’ in the form of the nation-state with One law. The social, political and juridical concomitants of finite and infinite conceptions of sovereignty are the refusal of plurality (of law and community). I also demonstrated how the insistence on a finite or monistic conception of sovereignty relies on an absolute ground of law in the Australian ‘postcolonial’ context. I examined recent ‘native title’ cases from Australia which have insisted on subjecting the ‘postcoloniality’ of Australian law and society to the following conditions: a unitary ‘political community’ as the Australian ‘nation’, and an essential ground for indigenous law and community regulated through the notion of ‘traditional law and custom’. I demonstrated how such unicity and essential ground for community refuses the plurality of existence. The re-presentation of the ‘postcolonial’ takes the juridical form of ‘one jurisdiction’, one ‘law of the land’. Such finitude and fixed position of law, I argued through Fitzpatrick and Nancy, is impossible. I compared

the Australian approach with the treatment of a plurality of law and sovereignty in the Canadian ‘postcolonial’ context. The objective was not to exhaustively cover the relevant case law in these two contexts, but to identify the insistence on monism and the refusal of plurality as phenomena manifested through the notion of ‘jurisdiction’. This discussion sets the scene for generalising my argument in the next two Chapters.

Nancy’s consideration of the notion of ‘jurisdiction’, examined at the end of this Chapter, undermines the monism and essential ground by which the relation between sovereignty and law are articulated by courts and legal theorists. He questions the possibility of a monistic position (by State, Monarch, Sovereign) that can symbolise or be the carrier of One law or One political community. ‘Jurisdiction’ is the spatial, territorialized manifestation of the ‘relation’ between sovereignty, law and the political. The co-presence of sovereignty, law and political community manifests the failure of finite or infinite sovereignty. This co-presence is re-presented by Nancy through the notion of ‘jurisdiction’.

In the next Chapter I will generalise these arguments about sovereignty, law and the political by considering the *habeas corpus* cases in relation to detainees in Guantanamo Bay, Cuba. The U.S Federal Court’s consideration of the notion of ‘jurisdiction’ is conditioned by the centrality of ‘finite’ sovereignty – an exceptional sovereign at war whose actions are beyond law, and formal sovereignty over a delimited territory. Jurisdiction is also articulated with reference to membership in a political community. The co-presence of ‘sovereignty, law and the political’ can be readily discerned through an examination of the *habeas corpus* cases brought on behalf of those detained at Guantanamo Bay. I will discuss these cases with a view

to posing and addressing the question of how the decision on 'jurisdiction' manifests the im-possible 'position' of sovereignty beyond law. It is the enunciation of the zone of right ('*juris-diction*'), the determination of when life will be mediated by civil law which, as we will see, constitutes political community.

CHAPTER 3

Sovereignty, Law and the Limits of Political Community

[U]nder the [U.S.] Government's theory, it is free to imprison Gherebi indefinitely [in Guantanamo Bay] ... without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees.

Gherebi v Bush and Rumsfeld (2003b) U.S Court of Appeals, 9th Circuit, 46.

They are ... "detainees", those who are held in waiting, those for whom waiting may well be without end. To the extent that the state arranges for this pre-legal state as an "indefinite" one, it maintains that there will be those held by the Government for whom the law does not apply, not only for the present, but for the indefinite future. ... if the detention is indefinite, then the lawless exercise of state sovereignty becomes indefinite as well. In this sense, indefinite detention provides the condition for the indefinite exercise of extra-legal state power.

Judith Butler, "Indefinite Detention" in Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (2004), 64.

This Chapter serves two principal functions. The first is to elaborate how the 'position' of sovereignty in relation to law is determined in and through the 'limits' of 'political community'. The second is to demonstrate the wider significance of my account of sovereignty developed with reference to 'postcolonial' Australia by examining its relevance for understanding the relation between sovereignty and law in what Derek Gregory has called the "colonial present" (Gregory, 2004). In short, I consolidate the significance of the 'political' for determining the 'position' of sovereignty in relation to law and generalise my argument beyond a particular 'postcolonial' context. These twin tasks are advanced by taking up a contemporary

instance of courts defining the position of sovereign power in relation to law in the context of an imperial sovereign at 'war', namely the 'war on terror'. The *habeas corpus* cases in relation to those detained in the U.S Naval Base at Guantanamo Bay are an apt choice for considering the link between sovereignty, law and 'political community' (hereafter, the 'political'). But I should justify my sustained treatment of them.

The U.S Executive asserted an archaic sovereign prerogative to detain, torture and execute people without trial (see epigraph from *Gherebi* above).¹⁰⁶ The detainees were captured during the 'war on terror' – a war which is purportedly without geographical or temporal limits. It is a war, like previous imperial conflagrations, which has been undertaken in the name of 'civilisation' with the objective of defeating 'barbarians' (Ignatieff, 2003b, 3, 21; for a critique see Gregory, 2004, 251). The 'barbarian' is once again a racialised foe – often the 'Arab', but more widely, the 'rigid' and 'frozen' 'Muslim fundamentalist', a member of the 'Muslim world' which seeks to destroy another chimera of colonialism, the 'West'.¹⁰⁷ The question of a court's jurisdiction to intervene in the face of an excessive sovereign demand for civil

¹⁰⁶ Although the recent Supreme Court decision in *Rasul v Bush* (2004) grants the detainees access to U.S Courts and thus rejects the extremes of the U.S Government's assertion of absolute sovereign power, as I will argue below, indefinite detention is likely to continue. Indeed, the decision in *Hamdi v Rumsfeld* (2004) confirms that normal due process will not apply in times of war.

¹⁰⁷ See the collection of articles that have both deployed and critically engaged the opposition between civilisation and barbarism in "State of Emergency" the Special Issue of the Journal *Theory, Culture and Society*: Vol: 19, 2002. Some of these articles deploy more sanitised metaphors for the opposition between civilisation and barbarism, but they remain symptomatic of a literature and discourse that sustains the imperial extension of the military power of the United States in the name of the 'West'. Consider, for instance, how the barbarian people and places are represented: 'safe zones' and 'wild zones' (Urry, 2002, 57-70); 'governance deficits' (Sassen, 2002, 233-244); the 'Muslim world which lacks a viable political agenda' (Dallmayr, 2002, 137-46). For characterisation of the post-September 11 era as involving Americans taking on the civilising "burden" that Kipling allocated to the English – of bringing order to the "frontier zones", and "barbarian zones" see Ignatieff, 2003a and 2003b. For a penetrating critique of this literature with valuable insights into the nature of neo-imperialism see Gregory (2004, especially, 248-256). For a critique of the figure of the 'West' as it is deployed in relation to the 'war on terror' see Jean-Luc Nancy, (2003c) and (2003d). I will return to discuss this literature and particularly the authors mentioned here in the next Chapter.

law to play no part in mediating the ‘life’ of the detainee (the ‘barbarian’, the ‘Muslim fundamentalist’ or ‘unlawful combatant’), harbours the problem of the relation between sovereignty, law and the political. The law, through the device of delimited jurisdiction, is being asked to withdraw in the face of the sovereign exception (see epigraph from *Gherebi* above). For reasons to be set out shortly, the nature of ‘jurisdiction’ is aptly considered through a discussion of the U.S Federal and Supreme Court decisions in *habeas corpus* petitions brought on behalf of detainees in Guantanamo Bay, Cuba.

Given the juridical status of the detainee has only recently been determined by the U.S Supreme Court (*Rasul* (2004)) there is a paucity of commentary on these cases. A significant portion of this Chapter will be devoted to giving an account of the *habeas corpus* cases which have turned on whether U.S Courts have ‘jurisdiction’ to grant the writ to those detained in Guantanamo Bay. The Chapter will be divided into two Parts. In *Part A* I will give an account of the case law. In *Part B* I will seek to displace the view that the decision to place a person deemed an ‘unlawful combatant’ beyond the reach of the law is a ‘purely’ exceptional decision that exceeds law. I will consider whether the condition of a ‘subject’ whose life appears unmediated by law (‘abandoned being’) (Nancy, 1993b) is the bearer of a sovereign exclusion which constitutes a political community.¹⁰⁸ In what way does the condition of the detainee whose life is unmediated by civil law disclose the delimitation of political community? This question addresses both the ‘position’ of sovereignty in relation to jurisdiction and the significance of the abandoned ‘subject’ for constituting the political. Contradicting the common view that the exception is beyond law, I will

¹⁰⁸ The etymological root of ‘abandon’, a-bandon, is *bandon* which means “jurisdiction and control”, OED. To be ‘abandoned’ is thus quite literally to be placed beyond ‘jurisdiction’. There are other meanings attributed to ‘abandonment’. I will return to consider these below.

argue that the purportedly illimitable sovereign occupies a 'position' that is constituted by the 'limit' of law and political community. Moreover, this position is inscribed by law.

Though commentary on the *habeas* cases has been sparse, there are some notable and provocative exceptions which I will draw on to frame my theoretical discussion of the cases. According to Judith Butler, the indefinite detention of persons in Guantanamo Bay represents the sovereign creation of a "pre-legal" state which is now made "indefinite" (Butler, 2004, 64). This is an advance on the Schmittian claim that the sovereign decides the exception (Schmitt, [1922] 1985). For Schmitt the sovereign is an 'unlimited power' that decides who the "enemy" is, decides when there is an emergency – but this is an "unlimited power that makes limits" to the extent that the exception is never "chaos" (Norris, 2000, 6). For Schmitt order in the juristic sense prevails. According to Butler, the sovereign introduces a 'pre-legal' exception which now becomes 'indefinite'. For Butler, the return of the 'archaic', 'pre-legal' sovereign is also accompanied by Foucault's 'official': "we have to consider the act of suspending the law as a performative one which brings a contemporary configuration of sovereignty into being or, more precisely, reanimates a spectral sovereignty within the field of governmentality" (Butler, 2004, 61). Is the exception 'pre-legal' or is a 'particular' law and community precisely what is guaranteed by the exception? How is an archaic, 'spectral' sovereignty reconciled with the notion of 'governmentality'? In the discussion that follows I will draw on Foucault's treatment of sovereignty and account of the emergence of 'governmentality', not only because Butler has drawn on his thought to account for

the juridical status of the detainee, but also because of the centrality of Foucault's thought for Agamben's account of sovereignty.

A substantial portion of this Chapter is devoted to examining the *habeas corpus* decisions by U.S Federal Courts and Supreme Court. On 28th June, 2004 the Supreme Court of the United States acknowledged that the detainees at Guantanamo Bay would have access to U.S Courts.¹⁰⁹ These Federal and Supreme Court cases manifest numerous formulations where a finite and infinite character is attributed to 'sovereignty' in the course of the Court determining its jurisdiction. Many of the varied characterisations of sovereignty circulating in the Federal Court decisions - sovereignty as a concomitant of 'territory', an attribute of a 'nation's dominion', derived from a 'people's delegation of authority and thus allegiance to a supreme authority' and so on - were not discussed or finally determined in the Supreme Court. As we gathered from the discussion in *Chapter One*, no such firm and conclusive determination of a 'thing' called sovereignty is possible. However, as long as a 'limit' to the normal juridical order is asserted in the form of a 'sovereign exception', it will remain pertinent to ask what determines this 'limit' (or finitude of sovereignty).

As I argue below, it is not likely that the Supreme Court decisions which grant the detainees access to U.S Courts will actually result in the detainees' lives being mediated by the normal procedures of civil law. The sovereign prerogative to identify the 'enemy' ('enemy combatant', (un)lawful combatant and so on), and to determine both the conditions under which these persons are detained and the duration of their detention has not been substantially curtailed by the Supreme Court. The distinction

¹⁰⁹ See *Rasul v Bush* (2004), *Hamdi v Rumsfeld* (2004), and *Padilla v Rumsfeld* (2004).

between a 'lawful' and 'unlawful' combatant has not been explained or settled. Moreover, the 'exceptional' condition of being in war affects the content of 'due process' that the Courts have agreed to grant the detainees. The 'limits' of sovereign power and the parameters of the juridical order (the wider concern of this thesis), and more specifically, the extent to which life is mediated by civil law and not the 'bare' will of a sovereign as the U.S Government asserted in *Gherebi* (see epigraph above), is thus a pertinent question that needs to be addressed. It is a question that could not have been adequately dealt with in the context of a 'postcolonial' polity and juridical order examined in the previous two Chapters. The question of the finitude or limit(lessness) of sovereignty does not only present itself when an 'old' colonialism is renewed by courts attempting to inaugurate 'postcolonial' law and society. The examination of the *habeas corpus* cases arising out of an indefinite 'war on terror' thus provides a setting to link the *re-colonising* gestures of the 'postcolonial' observed in Australia, such as monistic sovereignty, the centrality of 'nation', and a proper community which conforms to One law (discussed in the first two Chapters), with the persistence of these gestures in a new era of colonial and imperial expansion. The juxtaposition in my enquiry of the colonial 'past' of Australia with the colonial 'present' of U.S imperialism foregrounds the heterogeneity of colonialism.

Permit me a few more words to justify the examination of the *habeas corpus* cases which pertain to detention in Guantanamo Bay in this enquiry. The decision to grant the writ is dependent on whether the court has jurisdiction. But jurisdiction over which subject (custodian or detainee), in which 'territory' or space (U.S or Cuba or all places where military power extends), and at what point in time (is the writ available at a time of war/emergency)? The significance of the notion of 'jurisdiction' for

understanding the relationship between sovereignty and law is one important justification for examining the *habeas corpus* cases. Jurisdiction, I argued at the end of *Chapter Two* through Nancy's "The Jurisdiction of the Hegelian Monarch" (1993c), marks the co-presence of sovereignty, law and the political. Jurisdiction is thus a central notion through which to examine the question of the 'limit' or finitude of sovereignty and law. Jurisdiction is determined by the Courts' enunciation of the limits of the juridical order – literally, *juris-dicere* is 'to say' 'right'. This enunciation of an order of 'right' (*droit*), 'jurisdiction', is simultaneously the positioning of a 'people', the law that mediates their existence, and the spatial and temporal 'limit' over which such regulation extends. Though sovereign power in its imperial extension (as a 'war on terror') is 'permitted' an infinite reach in space and time, no such extravagance is practiced by courts who regard their own jurisdiction as finite. As I will explain below, the liminal figure of the detainee, 'bare life' or the 'camp-dweller', occupies the limit point at which sovereignty, law and political community converge (Agamben, 1998, 85; Butler, 2004, 67-8; Gregory, 2004, 62-3).¹¹⁰

¹¹⁰ This is clearly a simplification of a complex range of arguments in relation to the nature of the 'biopolitical' and the (sovereign) power that regulates it. The work of Schmitt, Foucault, and Agamben will be explored below with a view to elaborating this point.

PART A

3.1 Guantanamo Bay: Delimiting Sovereignty and Jurisdiction

Over six hundred detainees from forty nations have been held without charge or trial at the US Naval Base in Guantanamo Bay since January 2002. The land on which the Naval Base is situated was leased to the U.S by Cuba for the purpose of coaling and naval stations in 1903. The individuals labelled ‘enemy combatants’ were detained by the United States military and security agencies in the course of ‘military operations’ commonly termed the “war on terror”. Following the attacks on the World Trade Centre in New York City and the Pentagon in Washington, Congress authorised the President of the United States to use all “appropriate force” against nations, organisations, or persons who may have planned, authorised or committed the attacks that occurred on September 11th, 2001 (Authorisation for use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)). The Authorisation for the use of force was also directed at nations, organisations or persons who might harbour terrorists or who may commit “international terrorism” in the future. On 13th November, 2001, the President of the United States as Commander in Chief of its Armed Forces issued a ‘Military Order’ authorising the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” (*Presidential Documents, Federal Register*: November 16, 2001, Volume 66, No. 222, 57831-57836). According to section 2 of this Military Order, an “individual subject to this order” means “any individual who is not a United States Citizen with respect to whom I [the President] determine from time to time in writing” that, *inter alia*, an individual

is or was a member of al Qaida, or the person aims to cause “adverse effects” to United States citizens, security, foreign policy or economy (s. 2(1)). There is also a catch all provision in the Military Order - an individual can be so detained if “it is in the interests of the United States that such individual be subject to this order” (s. 2(2)). Section 4 provides for a Military Commission to try such individuals. The Commission may punish such individuals with “life imprisonment or death” (s. 4(a)). The President also declares the limits of all ‘other law’ to the extent that the Order purports to foreclose not only U.S courts, but the Court of any nation-state, or international tribunal from hearing an application (see quote below). The breadth of the Order is so excessive, so imperial in its purview, that it seems to be grounded on the assumption that the Commander in Chief of the U.S Armed Forces can make an order with respect to the jurisdiction of any tribunal, national or international. According to section 7(b)(1) and (2), military tribunals shall have exclusive jurisdiction with respect to offences by the individual subject to an order, and:

the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individuals behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal. (s. 7(b)(2))

What might be sought by an applicant is far from a ‘privilege’. What the Order seeks to prohibit is the possibility that the legality of detention will be scrutinised by a civil tribunal. This Executive Order presumes to foreclose the jurisdiction of U.S courts, the courts of other nations, and that of international tribunals. I will now examine the leading decisions in the U.S Federal Courts which have determined whether the jurisdiction of civil courts extend to Guantanamo Bay.

United States Federal Court decisions in *habeas corpus* applications brought on behalf of the detainees in Guantanamo Bay have determined whether the jurisdiction of U.S. courts extend to the U.S Naval Base in Guantanamo Bay, Cuba. The U.S Supreme Court on 28th June, 2004 ruled that the detainees should have access to U.S. courts (*Rasul* (2004), *Hamdi* (2004), *Padilla* (2004)). The U.S Government asserted that Constitutional protections do not apply to the detainees as Guantanamo Bay is outside the 'sovereign territory' of the U.S. The Government also asserted that international norms contained in treaties such as the *Geneva Conventions* do not apply because the detainees are 'unlawful combatants'. All but one of the Federal Court decisions accepted that Guantanamo Bay is outside the 'sovereign territory' of the U.S.¹¹¹ The issue of whether Guantanamo Bay is part of the 'sovereign territory' of the U.S or whether the jurisdiction of a U.S court extends to the territory/space of Guantanamo Bay was not conclusively determined by the Supreme Court. Though 'plenary jurisdiction' was affirmed, it was held that the U.S does not have 'ultimate sovereignty' over Guantanamo Bay (*Rasul* (2004), 6). It was also held that if the 'custodian' (Defence Department, Secretary of Defence or the agencies they control) is 'within the jurisdiction'¹¹² of a particular Federal District Court and thus can be reached by service of process, then the writ could be granted (*Rasul* (2004), 10, 15). The Federal Court decisions contain a more wide-ranging treatment of the relationship between sovereignty and jurisdiction. For this reason the finitude of sovereignty and its relation to law (considered through the jurisdiction of courts) should be examined through Federal Court and Supreme Court decisions.

¹¹¹ *Gherebi v Bush and Rumsfeld* (2003) was the first and only Federal Court decision to admit jurisdiction and bring executive action in Guantanamo Bay within the purview of judicial supervision. The earlier applications in *Rasul and Odah* (2002) refused to accept that the Court's jurisdiction extended to Guantanamo Bay as the latter was not within the 'sovereign territory' of the U.S.

¹¹² Much turned on this phrase which will be explained below.

There are several approaches taken by the U.S Federal Courts and Supreme Court to sovereignty and its relationship to jurisdiction in the key *habeas corpus* cases. I will consider these cases in detail, but will shortly summarise the overall approaches by way of introduction. In the process of eliciting the multiple meanings attributed to sovereignty in these cases I will also identify the problem of the ‘limit’ or finitude of sovereignty as it arises in these cases.

Here then are the multiple approaches to sovereignty and jurisdiction that have emerged in the *habeas corpus* cases and the discourses on the ‘war on terror’, the ‘war without end’:

- i. The approach in *Rasul and Odah v Bush* (2002) (multiple *habeas corpus* applications heard together) treated jurisdiction as a concomitant of a state’s sovereignty over ‘territory’. Sovereignty over a territory is deemed finite, delimited in time and space, and attributable to One sovereign. The courts of a state can have no jurisdiction over a territory unless the state also has formal sovereignty over that territory. Whether the U.S has sovereignty over Guantanamo Bay is determined by the meaning given to the words “ultimate sovereignty” in the 1903 Lease Agreement between the U.S and Cuba in relation to Guantanamo Bay. According to the reading of the Lease Agreement in *Rasul and Odah*, Cuba retains ‘ultimate sovereignty’ and the U.S has ‘jurisdiction and control’ (*Rasul and Odah*, 23). For the Court in *Rasul and Odah*, a finite sovereignty over Guantanamo Bay, which cannot be divided, shared or qualified, is attached to the nation-state of Cuba. Thus it

concluded that jurisdiction does not extend to Guantanamo Bay and the writ of *habeas corpus* is not available.

- ii. The approach developed by the majority in *Gherebi* (2003b) is multifaceted. On the one hand 'jurisdiction' is regarded as a notion which can be separated from sovereignty and indeed exist without sovereignty. In a circular formulation, the majority argued that jurisdiction follows from the exclusivity of 'control and jurisdiction' exercised over a territory. On the other hand the majority also tied jurisdiction to sovereignty, but unlike the earlier decisions in *Rasul and Odah*, found that the U.S exercises sovereignty over Guantanamo Bay. This conclusion was reached by regarding 'sovereignty' as capable of being divided or shared as a "present" and "future" interest (*Gherebi*, 31). This is also a finite conception of sovereignty whereby its finitude is graspable and capable of being divided and distributed – held by a particular sovereign at a certain point in space and time. Sovereignty is regarded as akin to the proprietary right to possession held differentially by a landlord and tenant. During the duration of the lease the tenant has a right to use and possess. On the expiration of the lease-period the right to use and possess reverts to the landlord. Cuba's "ultimate sovereignty" was characterised as a "reversionary right" (*ibid*, 28). Sovereignty, for the time being, is held by the U.S. This crude analogy was applied as a means of conceptualising sovereignty as a 'temporal' phenomenon that can be multiply held over a period of time. Sovereignty, on this account, is attributed a 'substance' and finitude that can be divided and shared.

- iii. The Supreme Court decision in *Rasul v Bush* (2004) finally determined the question of whether the writ of *habeas corpus* was available to the detainees. The Court determined the question by examining whether the Federal District Courts have jurisdiction under a habeas statute, 28 U.S.C §2241, to grant the writ “within their respective jurisdictions”. As the custodians of the detainees are ‘within the jurisdiction’ of a particular District Court, the statute authorises the court to issue the writ. This result does not adopt either of the two approaches outlined above. Jurisdiction is not a concomitant of ‘territorial sovereignty’. Nor is it the result of the elaborate ‘division’ of sovereignty observed in *Gherebi*. Territory is still an important pre-condition of jurisdiction. But it is the ‘territory’ of the respective Federal District Courts within which the custodian must be present. Providing the custodians are within that territory, the writ will be available. The significance of territory was made evident in *Rumsfeld v Padilla* (2004). The Court decided that Padilla’s petition was not brought in the correct jurisdiction. He is being held in South Carolina and the appropriate Respondent/custodian is the Commandant of the Naval Brig and not the Secretary of Defence.
- iv. Sovereignty is also regarded as infinite to the extent that the actions of the Executive during the ‘indefinite’ ‘war on terror’ are elevated beyond the limits of law. In *Hamdi* the Supreme Court acknowledged that the war currently being prosecuted by the U.S could last ‘two generations’ (*Hamdi*, 2004, 12). Although the Court in *Hamdi* did recognise that the *Geneva Convention* restricts detention to the duration of hostilities, such hostilities may continue indefinitely.

I am not attempting an exhaustive study here of the ‘war on terror’ conducted post September 11, 2001 by the U.S and its allies. Rather, what I wish to elicit for investigation are the implications of a globalised ‘war without end’ for thinking the sovereign exception, its finitude, representation, and delimitability. The ‘war on terror’ raises wider juridical and theoretical concerns than are capable of being considered within the confines of what is aptly justiciable. The ‘war on terror’ is an ‘exception’ that challenges the paradigm of inquiries which query whether the sovereign ‘event’ is inside/outside law (I would include Butler, (2004), among these). According to the decisionist model (which I will explain below) the sovereign is the one who decides on the exception. The decision on the exception is the sovereign decision to suspend the normal order, usually with the ‘end’ of preserving that order (Schmitt, [1922]1985, 12).¹¹³ But as the ‘emergency’ which accompanies the ‘war on terror’ is regarded as ‘without end’ – the detention of prisoners may be ‘for the duration of the conflict’, that is, indefinite (*Hamdi*, (2004), 10). A ‘war on terror’ presents particular difficulties when inquiring about the ‘limits’ and (teleological) ends of a sovereign power that decides on such a ‘war’. A ‘war on terror’ cannot be waged against a conventional ‘sovereign’. Nor is it the case, in this instance, that a ‘terrorist organisation’ with the usual ‘ends’ of terror such as extortion, founding a new order and so on can be identified and delimited. The ‘enemies’, it seems, are also ‘infinite’ – a “terrorist network” called “al-Qa’ida” (*ibid*, 10) with leaders who operate training camps throughout the world, with links to organised crime, money laundering and so on.¹¹⁴

¹¹³ According to Schmitt: “[b]ecause the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind” (Schmitt, 1985, 12).

¹¹⁴ The global deployment of military power to combat al-Qa’ida was summed up in both President George Bush and Prime Minister Tony Blair’s response to the beheading of the American Paul Johnson

The 'war on terror' is a 'war' that extends beyond 'space' and 'time' and is waged against an 'enemy' that is no longer identifiable with a 'state' or 'territory' (Derrida, 2003b, 46).¹¹⁵ Derrida has suggested that this scenario cannot be called a 'war' (ibid, 47). War involves the sovereign right to confront a sovereign *alter ego ad mortem* as Nancy put it (Nancy, 2000c, 106). According to Derrida the so-called campaign against "rogue states" such as Afghanistan and Iraq is an attempted 'rationalisation' for the absence of a 'traditional' sovereign against whom the 'sovereign right to war' can be exercised (Derrida, 2003b, 46-8). At the same time the absolute character of sovereignty, its 'indivisibility', is being challenged by the 'universality' of human rights and the International Criminal Court (ibid, 48-9). The 'im-possible' 'indivisibility' of sovereignty has also been challenged, as we will see below, by the Court of Appeals in *Gherebi* (2003). How, then, can the sovereign exception (which has so regularly been characterised (particularly through Schmitt) as the decision to preserve a 'particular' order and thus remains within the framework of the juristic, be explained when the exception is universalised, made 'indefinite' and infinite (see epigraph from Butler above)? Or is it the case, as Fitzpatrick has argued, that this neo-imperial 'globalism' is yet another imperial 'extra-version' of 'nation' (Fitzpatrick, 2001a, 146)? These are some of the questions that will be posed by examining the *habeas corpus* cases. There is indeed a crisis of an international system of sovereigns whose death is announced by one of their number. As Jean-Luc

in Saudi Arabia. Bush stated: "This murder ... shows the extreme nature of the enemy we face. These are barbaric people". Blair, who also referred to the act as an instance of 'barbarism' stated that: "This shows the nature of the people we are fighting day in, day out, around the world", *The Independent*, 19 June, 2004. This implicit invocation of a 'clash of civilisations' has been challenged by Nancy who contends that the 'West' as a finite and delimited place and enterprise in the 'world' must be rethought (Nancy, 2003b, 37). A similar thematic has recently been taken up by Jacques Derrida (see Derrida, 2003b). I will return to this point in *Chapter Four*.

¹¹⁵ Derrida, "The 'World' of the Enlightenment to Come (Exception, Calculation, Sovereignty", 2003b, has recently been published as *Rogues: Two Essays on Reason* (2004).

Nancy has put it: “I am convinced that the war we are in is the lot of a civilisation that is coming up against its own limit” (Nancy, 2003d, “The War of Monotheism”, 52). This emphasises the need to identify and consider the current crisis of sovereignty – a ‘globalised’ sovereignty in a “world” that, as Nancy tells us, can no longer be delimited between the ‘West’ and the “elsewhere” viewed through the prism of ‘orientalism’ or ‘primitivism’ (Nancy, 2003c, 37). What is to be made of sovereignty in a “globalisation” (democracy, technology etc) where “[t]here no longer is an elsewhere” (Nancy, *ibid*)? No ‘elsewhere’, no ‘outside’ – is this the ‘end’ of the ‘sovereign place’ that I heralded through Nancy in *Chapter One*? Is it premature and misleading to speak of a ‘global’ sovereign, or the ‘end of sovereignty’? These are questions that I will open in this Chapter and take up in the one that follows. I shall now consider the *habeas corpus* cases in more detail.

3.1.1 Rasul v Bush: The (other) Essence of Sovereignty

Rasul v Bush (2002) was the first *habeas corpus* application to be brought on behalf of the Guantanamo detainees in a U.S Federal Court. This application to the United States District Court for the District of Columbia involved two actions. The first consisted of petitions for the writ of *habeas corpus* by two British and one Australian national. In the second, *Odah v United States*, twelve Kuwaiti nationals sought a permanent injunction prohibiting the Government from refusing to allow them to meet with their families, be informed of the charges against them, consult with counsel of their choice and have access to impartial courts or tribunals. The U.S Government moved the Court to dismiss both actions on jurisdictional grounds.

The Federal Courts' decisions in the *habeas corpus* applications on behalf of those detained in Guantanamo Bay have involved considerable discussion of the phrases 'territorial jurisdiction' and 'sovereign territory'. Sovereignty is deployed as the *a priori* condition of jurisdiction. On the one hand sovereignty is allocated a 'position' that is discrete and separate – it is finite and independent of territory, history, or jurisdiction. On the other hand it is tied or placed in 'relation' with the territory that belongs to a 'nation'. The question of jurisdiction is ultimately tied to which 'nation' has *de jure* sovereignty over a territory. In determining whether the U.S. has sovereignty over Guantanamo Bay these cases reify the notion of 'sovereignty'. Sovereignty is treated as if it is a 'thing' with a 'presence'. However, this is not a 'presence' that is ascertainable 'in itself', one that is present unto itself or graspable by the courts. That is, it is only *with* reference to 'territory' and the *de jure* dominion of a 'nation' that sovereignty is given some 'substance'. Sovereignty is also placed in 'relation' *with* the juridical – the latter is made a concomitant of the former. The co-presence of sovereignty and jurisdiction is placed in a causative relationship whereby the latter is the *effect* of the former.

In formulating the condition for granting the writ the Court in *Rasul* applied the Supreme Court decision in *Johnson v Eisentrager* (1950).¹¹⁶ The Supreme Court in *Johnson* had held that although aliens, whether friendly or enemy, may be extended the privilege of litigation when they were in the U.S. because their presence in the country implies protection, no such basis can be invoked when "prisoners at no

¹¹⁶ *Johnson v Eisentrager* (1950) involved a petition to the United States District Court for the District of Columbia for the writ of *habeas corpus* by twenty-one German nationals. The Germans had been captured in China, after the surrender of Germany. They were accused of engaging in espionage on behalf of the Japanese at a time when the United States was still at war with the Japanese Empire. The Germans were tried and convicted by a United States military commission sitting in China and then repatriated to Germany to serve their sentences in a prison controlled by the United States occupying forces in Germany.

relevant time were within any *territory* over which the United States is *sovereign*, and the sentence for their offence, their capture, their trial and their punishment were all beyond the *territorial jurisdiction* of any court of the United States” (*Johnson v Eisentrager*, (1950), 777-78, emphasis added).¹¹⁷ The District Court in *Rasul*, citing *Johnson* as authority, declared that a court was unable to extend the writ of *habeas corpus* to “aliens held outside the *sovereign territory* of the United States” (*Rasul*, 72-73, emphasis added). This formulation gains considerable significance in light of the Lease Agreement for Guantanamo Bay between the United States and Cuba. Article III of this Agreement states:

While on the one hand the United States recognises the *continuance of the ultimate sovereignty* of the Republic of Cuba over [the military base and Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete *jurisdiction and control* over and within said areas with the right to acquire ... for the public purposes of the United States any land or other property therein by purchase or by *exercise of eminent domain* with full compensation to the owner thereof. (*Rasul*, 59)

The Court in *Rasul* asserted that “as is clear from this agreement, the United States does not have sovereignty over the military base at Guantanamo Bay” (*ibid*). The assertion is by no means convincing. It is belied by the discussion of different interpretations of the phrase “jurisdiction and control” in *Rasul* itself. For instance, the petitioners asserted that Guantanamo Bay was under the *de facto* sovereignty of

¹¹⁷ It is worth highlighting here that *Johnson* contained a powerful dissent that drew on models of “justice over violence” inspired by Tacitus, and the separation of powers embodied in the U.S Constitution that gives the judicial branch the power to set aside void actions by government officials (*Johnson v Eisentrager*, 791-98). The dissenting decision affirmed the Court of Appeals in *Eisentrager v Forrestal* (1948, at 963-5).

the United States. This argument was rejected after the Court considered and discussed Court of Appeals decisions in *Ralpho v Bell* (1977) and *Cuban American Bar Association v Christopher* (1995) (*Rasul* (2002), 69-71). These cases assert (rather than reason in any convincing way) that “jurisdiction and control” is distinct from ‘sovereignty’. ‘Jurisdiction and control’, according to *Ralpho* and *Cuban American Bar Association*, does not mean ‘territorial jurisdiction’. ‘Territorial jurisdiction’ is made an essential prerequisite for the judicial scrutiny of executive action. While the United States may have ‘jurisdiction and control’ over Guantanamo Bay (according to the Lease Agreement), this does not enliven the Court’s jurisdiction to grant the writ of *habeas corpus*. The reach of civilian courts will only flow from ‘jurisdiction’ being supplemented by what ever it is that is added by jurisdiction being ‘territorial’.

The “performative” decision of the court grants ‘territorial jurisdiction’ a privileged status over ‘jurisdiction and control’.¹¹⁸ As we will observe below, another court reached the opposite conclusion. I am setting out the reasoning of these courts in order to make the point that jurisdiction is not a self-evident concomitant of a ‘thing’ called sovereignty. Neither sovereignty nor jurisdiction has a readily ascertainable or graspable ‘presence’. The incidence of each is performatively inscribed by the courts. What we have observed thus far is that the condition of jurisdiction is ‘sovereignty of a nation over a territory’. Sovereignty over territory is not graspable other than through the identification of territory with a ‘nation’.

¹¹⁸ ‘Performativity’ characterises the undecidability between whether a declaration/decision asserts a constative or whether it is the declaration/decision itself that performs and thus produces the event/object of declaration/decision. It is unnecessary at this point to elaborate ‘performativity’ or ‘undecidability’ further, but see: Jacques Derrida (1986). For a discussion of undecidability in relation to the ‘sovereign event’ and for an elaboration of Derrida’s theory of the future-anterior foundation of law, see Stewart Motha (2002).

Sovereignty is thus not a discrete, finite phenomenon but one that is tied to some *other* essence. This *other* essence of sovereignty, in this case, is a quintessentially ‘political’ and historically specific notion, the ‘nation’. Sovereignty is only disclosed through its status as ‘symbol’ of a political community in the form of the ‘nation-state’. Jurisdiction is also a function of whether one is a ‘citizen’ or ‘alien’. Membership in a ‘political community’ as a factor that influences whether one will be afforded the protection of civil law courts is more explicitly articulated in *Johnson*.¹¹⁹ It also operates with some variability given being an ‘insider’ is no absolute guarantee that constitutional protections will apply (e.g. *Padilla* (2003); *Hamdi* (2002), (2004) – I discuss these cases below).

The decision of the District Court in *Rasul* was appealed to the United States Court of Appeals for the District of Columbia (*Khaled A.F. Al Odah v United States of America*, (2003)).¹²⁰ The two principal arguments on appeal were, first, that the Supreme Court decision in *Johnson* applied only to “enemy aliens” and that the petitioners in *Rasul* have not been charged or convicted by a military commission and thus adjudicated “enemies” of the United States (*Khaled A.F. Al Odah*, 7-13); and, second, that the Naval Base at Guantanamo Bay is in essence a ‘territory’ of the United States and the Government exercises sovereignty over it (*ibid*, 13-16).¹²¹ The Court of Appeals accepted that “none of the Guantanamo detainees are within the category of ‘enemy aliens’” (*ibid*, 9). An alien ‘friend’ can become an ‘enemy alien’ by “taking up arms against the United States”, but the present cases were decided on

¹¹⁹ I will return to consider *Johnson v Eisentrager* (1950) below.

¹²⁰ Appeals from Federal District Courts are taken to the Court of Appeals of the respective Federal District, and thence to the Supreme Court of the United States.

¹²¹ The detainees also sought relief under the *Alien Tort Act*, 28 USC 1350, but the Court of Appeals decided, again applying *Johnson*, that “[t]hey cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them”, p. 17.

the pleadings which denied that the detainees had engaged in anti-American hostilities (ibid). This conclusion should have served to remove the scenario of detention in Guantanamo Bay from the scenario of the Germans that were the subject of *Johnson v Eisentrager* (1950). The detainees in that case had been tried and found guilty of spying on behalf of an enemy (Japan) with whom the United States was then at war. Nonetheless, the Court of Appeals held that Rasul, Hicks, Odah *et al.* (the petitioners) have much in common with the German prisoners in *Johnson*: “they are aliens captured during military operations in a foreign country, are now abroad in the custody of the American military, and have never had any presence in the United States” (ibid). It then applied the majority reasoning of the Supreme Court in *Johnson* which reversed the Court of Appeal view that the Fifth Amendment (due process) application to “any person” should be interpreted as applying to ‘all the world’ (*Eisentrager v Forrestal* (1948)), that is, aliens or citizens with or without their presence in the United States: “constitutional rights mentioned are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens. That is how later Supreme Court cases have viewed [*Johnson v Eisentrager*]” (*Khaled A.F. Al Odah* (2003), 10-11). It was further held that the constitution does not entitle the detainees to due process and they cannot invoke the jurisdiction of the court to test the constitutionality or legality of restraint (ibid, 12). This reasoning was tied to the statement in *Johnson* that it was the ‘presence’ of the alien, whether friendly or enemy, *within* the United States that entitles the alien to procedural or constitutional protection.

In their argument to the Court of Appeals in *Khaled A.F. Al Odah* (2003) the detainees disputed the District Court’s conclusion in *Rasul* that the Naval Base in

Guantanamo Bay was beyond the 'sovereign territory' of the United States. They argued that it was essentially a territory of the United States, that the Government exercises sovereignty over it and that *Johnson* does not turn on "technical definitions of sovereignty or territory" (*Khaled A.F. Al Odah*, 2003, 13). It is true that *Johnson* did not set out to provide a thoroughgoing analysis of 'sovereignty' and 'territory'. At issue was the reach of law, determined it seems, by the apparently self-evident notions of 'territorial jurisdiction' and 'sovereignty'. The Court of Appeals disagreed with the petitioners' argument that the Supreme Court in *Johnson* interchanged 'territorial jurisdiction' and 'sovereignty'. 'Territorial jurisdiction' is said to delimit the reach of the U.S Courts. 'Sovereignty' apparently means "supreme dominion exercised by a nation" (*ibid*, 15). Refusing the detainees' argument that the U.S exercises 'de facto sovereignty' over Guantanamo Bay, the Court of Appeals concluded that no court of the U.S can "assert *habeas corpus* jurisdiction at the behest of an alien held at a military base leased from another nation, a military base outside the sovereignty of the United States" (*ibid*, 16). As with *Rasul*, the court deployed a finite conception of sovereign, one that can be identified and delimited through the 'territory' of a nation-state. The 'substance' allocated to sovereignty comes via the 'dominion of nation' and not something that can be attributed to a 'thing' called sovereignty as such. Finite sovereignty as such turns out to be impossible without being given its content through another 'essence', that of 'nation'.

3.1.2 *Gherebi v Bush*: ‘Divided’ Sovereignty?

Gherebi v Bush (2003a) is the other significant petition for the writ of *habeas corpus* in relation to detainees at Guantanamo Bay.¹²² The petition was dismissed for lack of jurisdiction but was successfully appealed in *Gherebi v Bush* (2003b).¹²³ The Appeals Court decision was the first to deny the U.S Government’s assertion that Guantanamo Bay is beyond the jurisdiction of U.S District Courts. The Court of Appeals concluded that *Johnson* does not preclude the District Court’s jurisdiction and that it has “jurisdiction to hear the writ because the custodians of the prisoners are within the jurisdiction of the court” (*Gherebi*, 7). The Court of Appeals reasoned that “even in times of national emergency – indeed, particularly in such times – it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike” (*ibid*, 8). It refused the Government’s argument that:

the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on *territory under the sole jurisdiction and control of the United States*, without permitting any recourse of any kind to any judicial forum (*ibid*, emphasis added)

The Court of Appeals reached this conclusion after identifying the dispositive issue as the “legal status of Guantanamo” (*ibid*, 13). In contrast to *Rasul* (2002) and *Khaled A.F. Al Odah* (2003), the Court of Appeals in *Gherebi* separated the question of

¹²² This petition was a next-friend petition filed following the court’s dismissal of a petition for *habeas corpus* by a coalition of journalists, lawyers, professors and clergy in *Coalition of Clergy v Bush* (2002) for want of ‘next friend’ standing. The amended petition in *Gherebi* was filed by Belaid Gherebi on behalf of his brother Faleh Gherebi (the detainee), and thus the question of standing was not present.

¹²³ Reference henceforth to ‘*Gherebi*’ will be to the decision of the majority of the Court of Appeals, Circuit Judge Reinhardt and Senior District Judge Shadur.

“territorial jurisdiction” from the question of whether the U.S has ‘sovereignty’ over Guantanamo Bay (*Gherebi*, see discussion of ‘territorial jurisdiction’, 14-24; and ‘Sovereignty in the 1903 Lease and Continuing Treaty of 1934, 24-33). Despite the welcome result in *Gherebi*, the reasoning in relation to the nature of ‘territorial jurisdiction’ and the nature of ‘sovereignty’ misconceives the ‘position’ of sovereignty in relation to ‘jurisdiction’. It is the nature of the relation between sovereignty and jurisdiction that I wish to elaborate once I have set out the problematic as it has emerged in these U.S decisions.

In *Gherebi* the U.S Government argued that notwithstanding what the 1903 Lease Agreement with Cuba, and the 1934 Treaty Defining Relations with Cuba, may say about the “jurisdiction and control” vested in the U.S, Guantanamo Bay falls outside U.S “sovereign territory” (ibid, 15-16). The question was thus whether, according to the Supreme Court authority of *Johnson*, it is “sovereignty” rather than “territorial jurisdiction” that is the prerequisite for the exercise of jurisdiction (ibid, 16-17).¹²⁴ There was no discussion of what qualities distinguish ‘territorial jurisdiction’ from ‘sovereignty’. It was simply assumed that the two are distinguishable. The majority in *Gherebi* read *Johnson* as indicating that ‘territorial jurisdiction’ is the requisite element for supporting the *habeas* jurisdiction of U.S courts and not ‘sovereignty’ (ibid, 19-20). The (obvious) circularity of the claim that jurisdiction should follow from a state having ‘jurisdiction and control’ is evident in the Court’s reasoning: “‘Territorial jurisdiction’ exists as to ‘territory over which a government or subdivision thereof, or court, has jurisdiction’” (ibid, 21).¹²⁵ Additionally the Court states that “Where a nation exercises ‘exclusive jurisdiction’

¹²⁴The phrase ‘jurisdiction and control’ which is used in the U.S-Cuba Lease agreement is used interchangeably with ‘territorial jurisdiction’ by the Court of Appeals in *Gherebi*, see p. 16.

¹²⁵ The source for this assertion in *Gherebi* is *Black’s Law Dictionary* (6th Ed., 1990).

over a territory, territorial jurisdiction lies” (ibid). Thus, by virtue of the “United States’ exercise of territorial jurisdiction over Guantanamo, habeas jurisdiction lies in the present case” (ibid, 23). Though this conclusion disposed of the issue before it, in the event that the alternative were the case and *Johnson* required ‘sovereignty’ as a requisite for jurisdiction, the Court went onto consider whether the U.S exercises ‘sovereignty’ over Guantanamo Bay,

The U.S-Cuba Lease Agreement of 1903 states that Cuba retains “ultimate sovereignty” over Guantanamo Bay (ibid, 16). The discussion of the concept of ‘sovereignty’ in *Gherebi* thus turned on the meaning of the term ‘ultimate’ rather than on ‘sovereignty’ as such. If ‘ultimate’ is the key “modifier” of sovereignty in the Lease Agreement, as the majority put it, should it be construed as a “temporal” or “qualitative” modifier? (ibid, 25-6). ‘Ultimate sovereignty’ in the ‘temporal’ sense would suggest that Cuba’s sovereignty over Guantanamo Bay is a “residual” interest, akin to a reversionary interest that substantively vests in Cuba once the U.S “abandons its physical and absolute control of the territory” (ibid, 26). The ‘qualitative’ meaning of ‘ultimate’ sovereignty connotes “basic, fundamental or maximum” sovereignty (ibid). The majority conclude that ‘ultimate sovereignty’ as used in the Lease “can only mean temporal and not qualitative sovereignty” (ibid, 26-7)¹²⁶:

Under the preferred construction of “ultimate”, the use of the term in the Lease establishes the *temporal* and *contingent* nature of Cuba’s sovereignty, specifying that it comes into being only in the event that the United States *abandons* Guantanamo: in such case, Guantanamo reverts to Cuba and to

¹²⁶ The key source for this conclusion is the trusty *Black’s Law Dictionary* which defines ‘ultimate’ to mean: “At last, finally, at the end. The last in the train of progression or sequence tended toward by all that precedes; arrived at as the last result; final”.

Cuban sovereignty rather than being subject to some other actual or attempted disposition. Most important, under the *preferred temporal construction*, Cuba does not retain any *substantive sovereignty* during the term of the U.S *occupation*, with the result that, during such period, sovereignty vests in the United States. (ibid, 29, emphasis added)

There are here a variety of meanings attributed to sovereignty. Sovereignty is at once divisible, temporal, and contingent. It is capable of being divided and held by an ‘occupying power’. Sovereignty is also capable of being abandoned or disavowed.¹²⁷ The reference to the U.S ‘occupation’ is also significant in that it points to the ‘exceptional’ character of U.S sovereignty over Guantanamo Bay. However, the reference to ‘occupation’ is also capable of undermining the rather flimsy metaphor of the landlord/tenant relationship by which sovereignty is regarded as a temporal phenomenon – for if Guantanamo is under ‘occupation’ then it is wholly artificial to be characterising the U.S-Cuba relationship in relation to Guantanamo through the notion of a ‘land disposition’. The fact that the Lease refers to the “*continuance* of the ultimate sovereignty of the Republic of Cuba” (emphasis added) is dealt with by treating the Lease as if it were a “standard land disposition” where “bundles of rights” are partitioned into present and future interests (ibid, 31). Thus what ‘continues’ as the ‘ultimate sovereignty’ of Cuba is sovereignty as a “reversionary interest” which must await the discontinuance of the substantive sovereignty currently indefinitely vested in the United States (ibid). Notably, the Court supports its conclusion by stating that the “division or sharing of sovereignty is commonplace. Sovereignty is not an indivisible whole” (ibid).

¹²⁷ This is a far from careful use of the term ‘abandon’ by the Court – an issue to which I will return below.

The 'division' of sovereignty through the Court's characterisation of 'ultimate' sovereignty as a 'temporal' or 'qualitative' phenomenon is a decision that enunciates the parameters of the juridical. The courts' jurisdiction is made a function of a 'finite', divisible, and thus graspable 'substance' – a divisible 'thing' which can be possessed by one 'nation' or another, or 'one-at-a-time' in relation to an other. The court thus attributes a 'finite' quality to sovereignty when it characterises sovereignty as divisible in space and time. This attempt to render sovereignty finite by regarding it as analogous to a 'standard land disposition' is called into question by a variety of other discourses on sovereignty which associate it with the exceptional decision that lies before or certainly outside the law. If the 'sharing' of sovereignty is 'commonplace', as the Court asserted in *Gherebi*, then what should be made of the regular assertion that sovereignty is singular, monistic, constitutive of the juridical order, and the unregulated power that determines when to suspend the normal legal order? The 'division' or 'sharing' of sovereignty is only sustained by associating sovereignty with 'territory'. It is 'territory' (as 'space', 'land disposition' etc) that permits or enables the divisibility of sovereignty. Jurisdiction is extended to Guantanamo Bay by equating sovereignty with territory – by turning 'ultimate sovereignty' into a temporal interest in a land disposition. Though this produces a welcome result, it is a far from adequate account of the relationship between sovereignty and jurisdiction. Sovereignty continues to be conceived, as with *Rasul* (2002) and *Khaled A.F Al Odah* (2003), through another essence - dominion of a nation over territory or the temporal divisibility of dominion over that territory.¹²⁸

¹²⁸ I will return to consider the 'division' of sovereignty through Derrida below.

3.1.3 *Rasul and Hamdi: Jurisdiction in a Time of War*

On 28th June, 2004 the Supreme Court of the United States decided *Rasul v Bush* (2004), *Hamdi v Rumsfeld* (2004), and *Rumsfeld v Padilla* (2004).¹²⁹ The question in *Rasul* was whether U.S Federal Courts have jurisdiction to consider the legality of the detention of foreign nationals captured abroad and being held in the U.S Naval Base in Guantanamo Bay, Cuba. The Court decided this question on the very narrow basis that Congress has granted Federal Courts jurisdiction in a Statute (28 U.S.C §§ 2241 (a), (c) (3)) to hear applications for *habeas corpus* “within their respective jurisdictions” by persons who claim to be “in custody in violation of the Constitution or laws or treaties of the United States”. The majority conveniently avoid quoting the full text of the statute as it discloses some ambiguity about the limits of the Federal Court’s jurisdiction. Scalia J who dissented was unrestrained in this regard:

Even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee: Section 2241 (a) states:

“writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*” (Scalia J, 2) (emphasis added)

It is not evident from this portion of the statute that the ‘detainee’ must be within the territorial jurisdiction of the Court as Scalia J claimed. ‘Territory’, however, is significant for determining the jurisdiction of a court. The question that emerges in interpreting this habeas statute is the meaning of “within their respective jurisdictions”. The majority resolved this question on the basis that it is adequate for

¹²⁹ These were all appeals from the Court of Appeals of Federal Districts.

the ‘custodian’ of the prisoner to be within the Court’s jurisdiction. By reaching this conclusion they indirectly sustain at least one part of Scalia J’s objection, that ‘within jurisdiction’ must mean ‘territorial jurisdiction’.

Previous decisions in *Ahrens v Clark* (1948) and *Johnson v Eisentrager* (1950) had interpreted this statute and its words “within their respective jurisdictions” as requiring the petitioner’s presence within the district court’s “territorial jurisdiction” (*Rasul*, 8-11, especially 8). This interpretation created a “statutory gap” whereby if the petitioner was not present within the court’s territorial jurisdiction, the court would not be able to grant the writ. The decision in *Rasul* has elected to follow the authority of *Braden v 30th Judicial Circuit Court of Ky* (1973, 495), which held contrary to *Ahrens*, that the prisoner’s presence within the territorial jurisdiction is not necessary because the writ of habeas corpus “does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody” (*Braden*, 494-5; *Rasul*, 10). The “custodian can be reached by service of process” (*ibid*).

The Court thus answered the question of whether the Federal District Court’s jurisdiction extended to Guantanamo Bay in the following way: the prisoners are in federal custody and alleging the violation of the laws of the United States. As no one disputes that the District Court has jurisdiction over the petitioners’ custodians the Court held that “§ 2241 confers on the District Court jurisdiction to hear petitioners’ *habeas corpus* challenges to the legality of their detention at the Guantanamo Bay

naval base” (*Rasul*, 15-16).¹³⁰ While this is a welcome result I would urge very strongly that it cannot be assumed that the prisoners are likely to have their detention reviewed by courts that will apply the normal processes demanded by due process. The Supreme Court’s lengthy and complex decision in *Hamdi* would sustain my contention. Before I turn to *Hamdi* let me draw attention to the alarm raised by Scalia J.

According to Scalia J the majority decision in *Rasul* creates the danger that “jurisdiction and control” which flows from a lease over a military base may also extend to ‘jurisdiction and control’ that arises out of occupation by “lawful force of arms” such as in Afghanistan or Iraq (*Rasul*, Scalia J, 14). Should all persons held in U.S custody in Afghanistan, Iraq or in countless other U.S military bases logically be regarded now as subject to the domestic laws of the U.S? It is this possibility that the Supreme Court has attempted to limit in *Hamdi*.

*Hamdi*¹³¹ involved the detention of a U.S citizen who was captured during military operations in Afghanistan. The question addressed by the court was whether the Executive has the authority to detain citizens who are “enemy combatants”. The Court agreed that Congress has authorised Hamdi’s detention in its Authorisation for Use of Military Force (AUMF) granted to the President. Following the attacks on the World Trade Center in New York City and the Pentagon in Washington, Congress authorised the President of the United States to use all “appropriate force” against nations, organisations, or persons who may have planned, authorised or committed the

¹³⁰ This was the line of argument in the Court of Appeals decision in *Gherebi*, 9th Circuit, Dec. 2003 – but the more complex issues of ‘territorial jurisdiction’ discussed in *Gherebi* were not canvassed in the Supreme Court decision in *Rasul*.

¹³¹ *Hamdi* (2004). The following in-text references are to the Supreme Court decision in *Hamdi*.

attacks that occurred on September 11th, 2001 (Authorisation for use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)). The Court confirmed that Hamdi is validly detained under this authorisation:

We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise of the “necessary and appropriate force” Congress has authorised the President to use. (*Hamdi*, (2004), 10)

The capture of lawful and ‘unlawful combatants’ is an important incident of war (ibid). Detention is fundamental to waging war and thus falls within the AUMF as ‘necessary and appropriate force’ (12). Can detention be ‘indefinite’ or ‘perpetual’? The Court recognises that the “war on terror” is “unconventional” and may be prosecuted for several generations (12-13). But indefinite detention for interrogation is not authorised by AUMF (13). However, and this is the key element that will impact on the future judicial assessment of detention in Guantanamo, the AUMF is interpreted as including the “authority to detain for the duration of the relevant conflict, and this is based on long-standing law-of-war principles” (13). The Court recognises that the conflict is ongoing in Afghanistan (13-14).

Detention for the duration of the conflict is only permissible once it is established that the detainee is in fact an “enemy combatant” – “whether this is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point” (16). In relation to the duration of detention Hamdi contended that Congress had not authorised indefinite detention.

The *Geneva Convention*¹³² requires that those detained be released and repatriated on the cessation of hostilities. The Court recognised that the “war on terror” underpins national security in ways that are “broad and malleable” (12). The Government conceded that the current conflict is unconventional and is not likely to end with a formal ceasefire (12). The Court recognised that the Government’s consistent position was that this “unconventional war” may not be “won for two generations” (12). Hamdi’s detention could thus last for the rest of his life (12). As long as the U.S is engaged in active combat in Afghanistan detention is recognised to be part of the “necessary and appropriate force” authorised by Congress (14).¹³³

If Hamdi is entitled to ‘due process’ while he is detained under the AUMF, what should this involve? In deciding this the Court balances Hamdi’s private interest to liberty with the “governmental interest” of ensuring that the enemy does not return to the battlefield (the reasoning now slipping back to the scenario of a conventional war) (17-24). The Court recognised that strategic matters in “warmaking” are in the hands of the Executive. In arriving at what it thought the content of due process ought to be the Court drew particular attention to the fact that Hamdi has the “privilege” of American citizenship (25). With these elements in mind, particularly that the Government was prosecuting ongoing military operations and that Hamdi is a citizen, the court set out the following elements of due process:

- A “*citizen-detainee* seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a

¹³² Article 118 *Geneva Convention III Relative to the Treatment of Prisoners of War*, August 12, 1949 [1955] 6 U.S.T 3316, 3406, T.I.A.S. No. 3364.

¹³³ Hamdi’s capture relates to the conflict in Afghanistan and so the Court referred to this particular front of conflict. But the ambit of the ‘war on terror’ is wider and detention may continue for the duration of this wider ‘war without end’.

fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker". (26, emphasis added)

- A 'properly constituted military tribunal' could meet this requirement of a neutral decision-maker. (31)
- Aside from the first core element of knowing the factual basis of detention in a timely fashion, "enemy-combatant" proceedings can be tailored to alleviate the potential to burden the Executive at a time of military conflict.
- Hearsay may have to be accepted as the most reliable form of evidence in proceedings that determine the factual basis of detention. (27)
- The Constitution will not be offended by a presumption in favour of the Government's evidence – that is once the Government puts forward its evidence, the onus will shift to the alleged 'enemy combatant' to prove that she/he is not an 'enemy combatant'. (27)
- The Court emphasises, several times, that it is dealing here with the *citizen's* core right to challenge the government's case (24, 25, 26, 30).

Although *Rasul* (2004, 12-13) extends access to U.S courts to citizens *and* aliens, what this actually amounts to for the non-citizen detainees at Guantanamo is far from certain. The detainees in Guantanamo will now have the right to ask a District Court to grant the writ of *habeas corpus*. But it remains uncertain what 'due process' concessions will be made to those whom the Government insists are 'unlawful combatants'. The distinction between 'lawful/unlawful combatants' and 'enemy combatants' has not been determined. The military tribunals which will now consider the factual basis of detention will also determine the nature and status of the prisoner. Jurisdiction of the Federal District Courts remains territorially specific and the detention of (un)lawful combatants will continue for the duration of a conflict which

the Court in *Hamdi* acknowledged may be for the rest of Hamdi's life (two generations).

There are several strands of 'relation' between sovereignty and law that are discernable through how a subject is brought before the law in these *habeas corpus* cases. The first is the significance of membership in the 'political community' of the nation-state. The emphasis on 'citizenship' clearly discloses the significance of membership in 'political community' for a life mediated by law. The authorities determined very early in the piece that Hamdi, a U.S citizen, would not be detained in Guantanamo Bay. While his detention still gave rise to questions of 'due process' and the legalities of indefinite detention, his status as the 'enemy within' clearly distinguished him from the thousands of other detainees imprisoned in military bases in Guantanamo Bay, Diego Garcia and Bagram Air Base, Kabul. The 'position' of the sovereign in relation to law disclosed in the determination of jurisdiction is thus conditioned by a subject's membership in a political community. But being inside/outside the 'nation' is not in itself adequate to explain the character of jurisdiction, and thus the relation between sovereignty and law, discernable from the *habeas corpus* cases. As we observed above in the discussion of Nancy's "Jurisdiction of the Hegelian Monarch" (1993c; see *Chapter Two* at 2.3), it is impossible to determine what comes first: the 'unity' re-presented and symbolised by the sovereign, the 'people' who are its constituent element, or a law that recognises and responds to the call of a juridical being. It is thus important to explore two other strands of relation between sovereignty and law disclosed by the cases: the 'exceptional' decision of a sovereign, and the 'governmental' character of the court's decision to grant the writ.

The ancient writ of *habeas corpus* is famously supposed to protect the liberty of the individual from the abuse of state power. Where a person is detained, so the mythic story goes, the state authorities can be compelled to produce the prisoner's body in court. But the story of the writ of *habeas corpus* is more complicated. In *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (2003), Nasser Hussain provides a stunning demystification of the celebrated writ by arguing that:

whether in its origin as a facilitation of sovereign power or its subsequent and modern guise as a check on the executive, whether used to intern or to free, *habeas corpus* is a mode of binding subjects to the law and to its economies of power. (Hussain, 2003, 70)

As Hussain emphasises, “Capias enforces the writ (Latin: “that you take”) by literally capturing the body and bringing it into the law” (Hussain, 69). As Hussain points out, this is an irony regarding the “Writ of Liberty” (Blackstone’s grand embellishment) that was realised with embarrassment by Edward Jenks: “whatever may have been its ultimate use, the writ of *Habeas Corpus* was originally intended not to get people out of prison but to put people in it” (Jenks, 1902, 65, cited in Hussain, 69). As we will see when we consider the *habeas corpus* cases in relation to Guantanamo Bay, it is the ‘custodian’ rather than the detainee that is ultimately made subject to the law (see *Rasul v Bush* (2004)). The availability of the writ to the detainees in Guantanamo Bay in fact consolidates the sovereign’s power by determining where the sovereign’s writ runs. The province of law is determined by the extent of a court’s ‘jurisdiction’ and which ‘subject’ will be governed by law. The relevant ‘subject-of-law’ over whom jurisdiction is ultimately asserted is not the detainee in the ‘camp’ but the ‘official’ who imprisons him. Moreover, and this reinforces the point about the writ

facilitating sovereign power, the U.S courts remain heavily deferential to the exigencies of a sovereign at war when determining the extent of ‘due process’ available to the detainee. In what follows I will consider, through a discussion of the *habeas corpus* cases, how a particular kind of ‘abandonment’ in the ‘camp’ discloses the nature of the relationship between sovereignty and jurisdiction.

To summarise, then, the three strands of the relation between sovereignty and law that I will explore in discussing these cases in *Part B* of this Chapter are these:

- i. The ‘governmental’ character of the decision on jurisdiction, explored through Foucault;
- ii. The character of the sovereign exception in relation to jurisdiction explored through a discussion of Carl Schmitt;
- iii. The question of how ‘abandoned being’ constitutes the political and juridical order explored through Agamben and Nancy.

PART B

3.2 'Relation of Jurisdiction' and 'Relation of Exception'

Let me begin by considering why sovereignty and jurisdiction cannot merely be delimited through 'space, land, or territory'. The enunciations of jurisdiction in the *habeas corpus* cases, as we have observed, are varied and contradictory. My enquiry *de-positions* any substantial 'presence' attributed to sovereignty by critiquing the 'in-finitude' or limit-lessness attributed to it. The insistence of a finite notion of sovereignty through the opposition of inside/outside (territory, nation, people) is an impossibility. Such finitude always already implies a relation, a co-appearance (*com-parution*) of each finite (sovereign) 'position' (discussed in *Chapter One*). The infinite quality attributed to sovereignty, as we observed through Nancy, involves asserting 'completeness' of 'position' and 'relation'. Recall Nancy's point that war is the 'technology' of sovereignty not only as the means to sovereign ends but as sovereignty's "mode of accomplishment", its "finish" (Nancy, 2000c, 120). By 'finish' Nancy meant the 'limit' of a sovereign logic to determine and accomplish its own sense of the good, carrying itself to the "extremity of its own Being" (Nancy, *ibid*, 118). Nancy sets out to undo the apparent completeness of 'position' attributed to sovereignty by disclosing the 'singular plural spacing' of all position, being, ends (*ibid*, 136-139; and Nancy, 2000a, 36). The examination of the *habeas corpus* cases demonstrated how the positioning and re-positioning of sovereignty is articulated by courts in the process of determining their jurisdiction. The cases also demonstrate that the nature of sovereignty is often disclosed through some other 'essence' such as territory and 'people'. They also provide an opportunity to critically examine a range

of theoretical approaches to sovereignty which regard sovereignty as having the 'infinite' potential to remove a particular factual instance from the ambit of law (Schmitt); regard sovereignty as an anachronism (Foucault)¹³⁴; or as occupying an indeterminate place at the threshold between inside and outside a juridical and political order (Agamben).¹³⁵

As we observed in the *habeas corpus* cases considered above, jurisdiction is exercised within a delimited, territorialised 'zone' of authority. The question of the 'limit', in particular the limits of law, must be explored further. Moreover, how does the sovereign exception relate to the delimitation of law? Nancy considers jurisdiction to be a question of 'what actualises the law' (Nancy, 1993c, 110). The actualisation of the law involves a '*decision*' that makes the law effective (ibid). This decision is itself an 'act of law' that particularises, actualises, or 'institutes' a juridical order by bringing the factual within its purview.¹³⁶ The law's actualisation in relation to a case is a performative event which Nancy recently explained in the following way:

the relation of law to case – the *relation of jurisdiction* – means that no case is a law and that a case only falls under the law once the law speaks of it. The accident – what happens – has to be struck by the seal of the law (of its utterance) in order to be not simply judged but constituted as an instance or case of right, modelled or sculpted (*fictum*) in terms of right. Juris-diction is or makes up juris-fiction. Law and case come before right only if they are

¹³⁴ Although, as we will observe below, Foucault also insists that sovereignty persists.

¹³⁵ This is a necessarily simplified account of each of these theorists whose work is more nuanced. I will elaborate their thought below.

¹³⁶ 'Perview', originally '*purveu*', etymologically, the "body of a statute, following the preamble, and beginning 'be it enacted'", OED.

modelled, shaped, fashioned – fictioned – in and through one another. (Nancy, 2003a, 156-7, emphasis added)

Bringing fact within law is an infinite task of fashioning the case to bring it within an order of right (Nancy, 2003, 161). This ‘fashioning’ not only brings the ‘fact’ within ‘right’ – the decision to include the factual situation constitutes the law at each instance of legal decision.¹³⁷ It is in this way that ‘juris-diction’, for Nancy, is ‘juris-fiction’.¹³⁸ This account by Nancy emphasises how the fact is brought within right in a process that is mutually constitutive of fact and right and the ‘limit’ between the two. Let me explain this account of the ‘relation of jurisdiction’ through Derrida (2002) and Fitzpatrick’s (2001a) account of the nature of the legal decision.

Recall the discussion of Fitzpatrick’s characterisation of the ‘position’ of law as a persistent condition of being in ‘apposition’ (in movement between position and what is beyond ‘it’) (Fitzpatrick, 2001a, 60, 62, 100). I argued in *Chapter One* that Fitzpatrick’s conception of law corresponded to Nancy’s critique of finitude. Through Nancy we observed how the ‘limit’ does not absolutely ‘separate’ what is enclosed. Through Foucault we examined how the ‘limit’ is not absolutely uncrossable (Foucault, 1977, 34; Fitzpatrick, 2001a, 60, 62). Any ‘position’ unceasingly transgresses the ‘limit’ that sets it apart from that which is beside it. Bringing this

¹³⁷ Nancy’s argument is very close, here, to Derrida’s account of the legal decision and its relationship to the origin of law, (Derrida, 2002).

¹³⁸ Nancy’s critique of the finitude of being also asserts the impossibility of ‘pure’ ‘position’ or separation. The relation that upsets One sovereignty manifests the problematic of ‘limits’ that constantly face the fact of their imminent disappearance in the relation to which they are exposed. This is a dynamic that Foucault splendidly explained in his “Preface to Transgression” (1977). As Foucault put it:

Transgression is an action which involves the limit, that narrow zone of a line where it displays the flash of its passage, but perhaps also its entire trajectory, even its origin; it is likely that transgression has its entire space in the line it crosses. (ibid, 33-4)

Whatever the ‘density’ of limit or transgression, each could not exist without the other. “A limit could not exist if it was absolutely uncrossable” for this would amount to an unfathomable stasis (ibid, 34). And “transgression would be pointless if the limits it faced were illusions and shadows” (ibid). Every time transgression crosses the limit it effaces the condition of its own existence (Ibid, 35).

analysis to bear on law Fitzpatrick argues that law is not entirely independent or autonomous for it has to respond to what lies beyond the rule (Fitzpatrick, 2001a, 70). For Fitzpatrick the line contiguous to what is inside and outside a legal order, community or society is occupied by law. Even though this “condition of being in law is always unresolved” the prospect of resolution arises from the dimensions of inside and outside being “integral to each other” (Fitzpatrick, *ibid*, 73). Law occupies the limit but is itself irresolute and indeterminate. Though completeness of position and responsiveness to a beyond are antithetical, Fitzpatrick places law “in-between” these mutually necessary exigencies (*ibid*). The movement between determinant position and responsiveness to a beyond are manifest in the legal decision, which, as Derrida remarks, in order to be ‘just’ must be regulated by a pre-existing rule *and* be without regulation (Derrida, 2002, 251). The decision must not be arbitrary – but no rule can sufficiently encompass the ‘incalculable’ and infinite demand of justice. The just decision must preserve the rule and destroy it – the ‘limit’ of the law must be re-invented by the judge in each case (*Ibid*). Though the factual situation is what lies beyond law, beyond the ‘limits’ of jurisdiction, the ‘position’ of law/jurisdiction must be in constant movement across the ‘limit’ that marks its ‘outside’ – thus forming and re-forming the ‘outside’ and the limit that marks it.

How does this ‘relation of jurisdiction’ which Derrida, Fitzpatrick, and Nancy articulate – the relation of rule/right to fact - relate to the refusal to apply the law to a ‘territorialised’ beyond controlled by the ‘infinite’ power of a sovereign at ‘war’ – the

‘sovereign exception’?¹³⁹ The ‘shaping’ and ‘modelling’ of law to the case, the “relation of jurisdiction”, when brought to bear on the context of Guantanamo Bay raises the question of the relation between jurisdiction and the ‘sovereign exception’ - the decision to remove the factual from the purview of law. That is, the refusal of courts to admit jurisdiction over the ‘space’ of Guantanamo Bay either because it is beyond a reified notion of ‘sovereign territory’ or due to the exigencies of ‘war’ determined by a sovereign power that exceeds law, raises the question of the court’s role in ‘fashioning’ the exception (law’s excess), and its consequence, the condition of ‘life’ unmediated by civil law. Is the ‘sovereign exception’ an instance, as Nancy has put it, of ‘juris-fiction’? To put it another way, how is ‘jurisdiction’ constituted through the ‘abandonment’ of the life in the camp? I will take up these questions by comparing Nancy’s account of ‘jurisdiction’ with Agamben’s treatment of the ‘sovereign exception’. What is the relationship between ‘juris-fiction’ (the ‘relation of jurisdiction’) which Nancy describes, and the sovereign decision on the exception (the ‘relation of exception’) which Agamben (Agamben, 1998, 18) describes?

By addressing these questions in the context of the *habeas corpus* cases I wish to advance my enquiry into the nature of the relationship between sovereignty and law by discussing a very explicit instance of how membership in ‘political community’ lies in-between sovereignty and law and thus constitutes the ‘limit’ between the two. Although *Rasul* (2004) gave aliens access to U.S Courts, the indeterminacy of the status of ‘unlawful combatants’, the limited/altered application of due-process, and the emphasis on the rights of the “citizen-detainee” suggest that citizenship and membership in a political community will continue to ground

¹³⁹ This is a question that resists the all too common announcement of a ‘deterritorialised’ world that accompanies ‘globalised’ sovereignty – arguments which I will address in the next Chapter.

differential treatment. By examining the notion of ‘abandonment’ – the condition of a being placed outside the reach of a nation-state’s normal legal order – I wish to make the argument that a being placed ‘outside’ the juridical order constitutes the ‘limit’ between sovereignty and law. Being abandoned from/by ‘political community’ thus lies in-between sovereignty and law. This remains the case with respect to the detainees in Guantanamo Bay whose detention for the ‘indefinite’ time of war, subject to review of its factual basis, was implicitly endorsed in *Hamdi* (2004).

The decision to ‘abandon’ life, to place it beyond the calculations of law, has been characterised as the decision on the exception which constitutes the law (Agamben, 1998, 18). Butler deploys Agamben’s analysis in order to explain the phenomenon of ‘indefinite’ detention in Guantanamo Bay (Butler, 2004). Is ‘indefinite detention’ the condition of being ‘abandoned’ by law? Is ‘abandonment’ the necessary concomitant of the ‘relation of exception’ – the event that marks the originary decision that constitutes sovereignty? I will consider these questions by comparing Agamben’s treatment of the notion of ‘abandonment’ with Nancy’s articulation of the concept. According to Agamben the ‘relation of exception’ involves the ‘inclusive exclusion’ of that which is ‘taken outside’ the normal juridical order (Agamben, 1998, 18). The question of whether a person is inside or outside the law is not only a question of law’s ‘application’ but a more complex case of being ‘abandoned’, ‘inclusively excluded’ by the law. For Agamben, it is not the decision to ‘apply’ the law but the decision to ‘abandon’ life that constitutes the juridical order: “*The originary relation of law to life is not application but Abandonment*” (Agamben, 1998, 29, original emphasis). What/who determines whether ‘life’ is mediated by law? Is law’s jurisdiction a decision of a sovereign or of courts, of fact or of right?

Jurisdiction, the province of law, the condition of being a juridical subject, cannot be explained through a crude decisionism or, as is the case with *Rasul*, *Odah*, and *Gherebi*, by the assertion of the ‘presence’ of something called ‘territorial jurisdiction’ or ‘sovereign territory’. The following questions are addressed in the discussion that follows: does the ‘sovereign’ decision on the political (Schmitt) which places ‘life’ beyond law constitute the juridical order; is the decision on ‘jurisdiction’ an event by which law institutes itself ‘reflexively’; does law ‘in-form’ itself through the decision on jurisdiction (Fitzpatrick, 2001a, 73-9) (what Nancy has called ‘juris-fiction’)? I shall consider these questions through Butler and the theorists on whom she draws: Foucault, Schmitt and Agamben.

3.3 Governing the Exception

The President of the United States, by Executive Military Order, determines the conditions under which a military trial may take place in Guantanamo Bay. Under this authorisation the Department of Defence and the Department of Justice have issued Guidelines for the conduct of Military Tribunals in Guantanamo Bay. Butler describes this scenario as “the executive branch assuming the power of the judiciary” (Butler, 2004, 54). As we observed above, *Hamdi* (2004) has endorsed this process. According to Butler a sovereign power has usurped the role of the judicial branch. The Military Order which governs the ‘indefinite detention’ of those captured during the ‘war on terror’ is characterised as marking the return of a unitary, “indivisible” sovereign (Butler, 54) - a monistic sovereign elevated ‘beyond law’. Taking up the Benjaminian mantle as critic, Butler examines the ‘constellation’ formed between this era’s sovereignty and an earlier one (ibid, 53). The history of sovereignty as a

continuum is, through this mode of critical engagement, “blasted out” of its “homogenous course” (Butler, *ibid*; Benjamin, 1968). According to Butler, the sovereign decision to suspend the application of normal judicial processes is “anachronistic” (Butler, 62), marking the return of an archaic sovereign. However, this is not the return of a ‘purely’ indivisible and ‘singular’ sovereign. The ‘power’ exercised by the state to suspend the law invests “governmental bureaucrat[s] with an extraordinary power over life and death” (*ibid*, 59). The Government official with the power to make the decision to “deem” someone “dangerous and constitute them as such, is a sovereign power, a ghostly and forceful resurgence of sovereignty in the midst of governmentality” (*ibid*).¹⁴⁰ But these ‘officials’ are also not “true sovereigns” (*ibid*, 62) – that is to say, their power is not finite and singular but diffuse. The officials’ power is delegated to them and they do not fully control the aims of their actions: “Power precedes them, and constitutes them as “sovereigns”, a fact that already gives the lie to sovereignty” (*ibid*). These ‘petty’ sovereigns are thus not absolute but part of a larger distribution of power. On the other hand, there is, in the terms of my analysis, a sovereign with a purportedly ‘infinite’ character in the form of the state which declares an emergency that is “not limited in time and space” (*ibid*, 64). This ‘infinite’ state power is capable of restructuring “temporality itself, since the problem of terrorism is no longer a historically or geographically limited problem: it is limitless and without end, and ... the prospect of an exercise of state power in its lawlessness structures the future indefinitely” (*ibid*, 65).

Butler’s analysis of the juridical status of detainees and the nature of the sovereign exception in Guantanamo Bay deploys Foucault’s notion of

¹⁴⁰ I will return to elaborate Foucault’s notion of ‘governmentality’ below.

‘governmentality’ and Agamben’s conception of the ‘relation of exception’ (see *ibid.*, 60-3).¹⁴¹ As I have indicated, Butler also captures the finite and infinite qualities that are regularly attached to sovereign power. Officials exercise power that is part of a diffuse governmental network of power distinct from the absolute sovereign of old, but the ‘permanent exception’ also heralds the arrival of an infinite sovereign that is not delimited in space and time. Butler’s analysis assumes both finite and infinite sovereignty as what conditions the juridico-political problems raised in relation to Guantanamo Bay. Her analysis usefully deploys Foucault and Agamben in analysing the status of the figure in the camp. The figure ‘abandoned’ in the camp is ‘inclusively excluded’. To what extent does this ‘inclusive exclusion’ explain the constitution of the juridical order? Butler underplays this aspect of Agamben’s thought. The notion of ‘abandonment’ is quite central to explaining the constitution of the juridical order. Finite and infinite conceptions of sovereignty alone are not adequate to explain the relationship between law and sovereignty.

Let us first consider the two influential though vastly disparate conceptions of sovereign power that Butler and Agamben draw on – that of Foucault and Schmitt. Why consider these two thinkers together? Foucault and Schmitt are the joint provocations for Agamben’s theorisation of the ‘life’ in the camp and what it tells us about the nature of sovereign power. The distinct contribution made by Agamben for the study of modern power and sovereignty is to bring Schmitt’s thought on the sovereign exception to bear on Foucault’s genealogy of modern power and ‘biopolitics’ (see Gregory, 2004, 62-3 and footnote 43, pp. 282-3). Agamben’s thought on the ‘life’ of the ‘camp’ has attracted considerable and influential attention

¹⁴¹ Her account is probably the most theoretically informed engagement with the logic of indefinite detention without trial – drawing on Agamben, Foucault, Schmitt and Derrida to explain the nature of sovereign power as it ‘operates’ in relation to Guantanamo Bay.

(as I have just demonstrated through Butler). It is thus apposite to set out the salient elements of Foucault and Schmitt's thought by way of setting the scene for a discussion of Nancy and Agamben on the notion of 'abandonment'.

3.4 De-Positioning Sovereignty: Foucault

Butler (2004) and Agamben (1998) rely on Foucault's attempt to displace the conception of sovereignty as the absolute power over life and death. Both Butler and Agamben underplay the nuanced insights which Foucault offers.¹⁴² We observed that Butler relies on Foucault's notion of 'governmentality' to explain the character of 'power' as it operates in relation to indefinite detention in Guantanamo Bay. I wish to examine what Foucault meant when he introduced this notion to the study of 'power' in modern government. How do 'governmentality' and 'biopower' (the other notion by which Foucault displaced the centrality of sovereignty) contribute to an understanding of how techniques of subjection operate in what Butler terms the 'extra-legal' zone of the 'camp' (Butler, 2004, 64)? This discussion will serve as a precursor to examining Agamben's account of the constitutive role, for the juridical and the political, of the figure 'abandoned' in the 'camp'.

Foucault provided an account of 'governmentality' in his lecture to the Collège de France in 1978 (Foucault, [1978]1991, 87-104). There is a co-presence of the 'archaic' sovereign and the emergence of 'governmental' power in Foucault's account. 'Governmentality' is:

¹⁴² Admittedly there is Butler's more lengthy work on Foucault in (Butler, 1997, Ch. 3). I acknowledge that Butler (2004) is a more polemic engagement and there is thus less space for a treatment of the more nuanced aspects of Foucault's thought on sovereign power.

The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security. (ibid, 102)

In the lecture Foucault examined theories of sovereignty and government from Machiavelli's *The Prince*, for instance, but drew attention to the emergence of a literature in the sixteenth century which defined "an art of government" (Foucault, ibid, 89). The 'art of government' brought questions of the 'economy' within the explicit calculation and management of the state, rather than being consigned to the private sphere (ibid, 92). The fundamental 'objects' of government in the Machiavellian Principality were "territory" and its "inhabitants" (ibid, 93). The sixteenth century texts on the art of government do not oppose men to 'things' but show that "what government has to do with is not territory but rather a sort of complex composed of men and things" (ibid). The 'things' are 'men', "but men in their relations, their links, their imbrications with those other things which are wealth, resources, means of subsistence, the territory with its specific qualities, climate, irrigation, fertility, etc" (ibid). In the archaic mode of sovereignty the 'end' of sovereignty is circular: "the end of sovereignty is the exercise of sovereignty" (ibid, 95). With the 'art of government' a new kind of finality, new 'ends' and 'limits', determined by "tactics" to achieve a plurality of aims is introduced (ibid). Foucault emphasises that this does not mean that sovereignty ceases to play a role. What changed with the emergence of the 'art of government' was that sovereignty was given a foundation in and through juridical and institutional forms, that is, through law (ibid, 101). So in fact the "problem of sovereignty is made more acute than ever"

(ibid). Thus it is by no means correct to assume that Foucault displaced the significance of sovereignty in the study of power.

Foucault did, however, attempt to shift the focus from power exercised by a central sovereign authority to the locus of power as operating in disparate sites of domination. The formation of the subject and its subjection by instruments of power is de-coupled from the juridical problematic of sovereignty in Foucault's paradigmatic interventions on power, subjectification, and juridical forms (Foucault, 1997). According to Foucault, since the Middle Ages the task of theories of right has been to establish the legitimacy of power, and "the major or central problem around which the theory of right is organised is the problem of sovereignty" (Foucault, 2003, 26). Foucault refutes these 'legitimation theories' because they:

divert us from considering the terms in which modern government confers rationality, and thus possible acceptability, on its activity and practice. This is the main reason why he argues political analysis is still immature, having still not cut off the king's head. (Gordon, 1997, xxxi)

The attention of political philosophers like Hobbes and Rousseau was on accounting for the juridical limits of a centralised sovereign power. Foucault's project is the opposite:

We have to bypass or get around the problem of sovereignty – which is central to the theory of right – and the obedience of individuals who submit to it, and to reveal the problem of *domination and subjugation* instead of sovereignty and subjugation. (Foucault, 2003, 27) (emphasis added)

For Foucault this is only possible with a focus on power at its extremities. The individual is a 'power effect', a 'relay for power': "power passes through the

individuals it has constituted”; “Power is exercised, circulates, and forms networks” (ibid, 30). What is asserted here is a type of power that Foucault terms “nonsovereign power” or “disciplinary power” (ibid, 36).¹⁴³ The right of sovereignty and the mechanics of discipline go together (ibid, 37). There is a convergence of theories of sovereignty (mechanisms of totalisation¹⁴⁴) and techniques of disciplining the subject, implementing mechanisms of surveillance and control (panopticism), and producing what Foucault in *The History of Sexuality, Vol. I* termed ‘bio-power’ (Foucault, 1984, 258-274).

‘Bio-power’ is the term Foucault gives to the emergence of techniques in which power-knowledge converge in institutions such as the army, schools, hospitals, the clinic etc. to regulate, manage and control, through discourses of normalisation, the ‘performances of the body’ and the ‘processes of life’ (Foucault, 1984, 262). Bio-power is contrasted to the power of the sovereign, derived from the ancient *patria potestas*, the power granted to “the father of the Roman family to ‘dispose’ of the life of his children and slaves” (ibid, 258). This power was considerably diminished by classical theoreticians and by early modern thinkers like Hobbes who framed the power of the sovereign over the life of his subjects with the concomitant right of the subjects to resist. Nonetheless, an asymmetric right to decide over life and death was vested in the juridical figure of the sovereign (ibid). The implication of the emergence of ‘bio-power’ for Foucault is that the place of the “enemy” in the calculations of the sovereign diminishes. Indeed, once regulation and control are

¹⁴³ See also Foucault, “*Truth and Juridical Forms*” (1997) for an elaboration of the emergence of “disciplinary society” in the late eighteenth and early nineteenth century, pp. 52-70. In “*Truth and Juridical Forms*”, Foucault also elaborates a historical development related to the “disciplinary society”, the emergence of the Benthamite notion of “panopticism”, pp. 70-87.

¹⁴⁴ See Giorgio Agamben (1998), pp. 5-9. I discuss Agamben below.

dispersed in multiple institutions and sites of power-domination, a singular and monistic conception of the right of the sovereign becomes an archaism:

[i]t is no longer a matter of bringing death into play in the field of sovereignty, but of distributing the living in the domain of value and utility. Such a power has to qualify, measure, appraise, and hierarchize, rather than display itself in its murderous splendour; *it does not have to draw the line that separates the enemies of the sovereign from his obedient subjects*; it effects distributions around the norm. (ibid, 266, emphasis added)

It is this claim that Agamben purportedly ‘corrects’ with his attempt to bring the significance of the Schmittian ‘exception’ to bear on Foucault’s account of ‘governmentality’ and ‘biopower’ (Agamben, 1998, 5-6). I will expand on this view shortly. For my purposes what is relevant is the extent to which Foucault sets out an account of power that might be applied to the context of Guantanamo Bay – an approach that is adopted by Butler. The modest point to be made from my brief excurses on Foucault’s thought is that an ‘archaic sovereign’, far from needing to be imported in from the ‘past’ to sit alongside governmental forms of power (Butler’s argument), is actually co-present with that power in Foucault’s thought.

What is the place of law in Foucault’s thought? Is the sovereign and the juridical structure it maintains only a façade for deploying mechanisms of ‘normalisation’? An examination of Foucault and Blanchot, in their address to each other, is a useful means of responding to this question (Foucault and Blanchot, 1987). Foucault, under the title ‘Where is the law, and What Does it Do?’ (ibid, 33), characterises law as manifesting a ‘withdrawal’ with which it ‘conceals itself’. The law is not ‘self-evident’ or ‘in the heart’, for then it would permeate and infuse the

“sweet interiority of consciousness” (ibid). Nor does it have the ‘solidity’ of a line in a text that can be readily consulted and deciphered. Where then is its power and with “what force and prestige would it command respect?” (ibid). Foucault’s answer is that the law must be provoked with transgression before it shows itself (ibid, 34). The essence of law, then, as we observed through Fitzpatrick above, is to be found in-between a limit and its transgression. The “presence of law is its concealment” (ibid, 33). It is the “outside that envelops conduct, thereby removing it from all interiority” (ibid, 34). Transgression, by attracting the law to it, is an attempt to make the law which is in withdrawal appear: “[t]he law is the shadow toward which every gesture necessarily advances; it is itself the shadow of the advancing gesture” (ibid, 35). There is a relation, then, between law and transgression, but one that is always in movement towards *and through* the other. The subject, her action, is the ‘inside’ shadowed by law:

[t]hat is why transgression endeavours to overstep prohibition in an attempt to attract the law to itself; it always surrenders to the attraction of the essential withdrawal of the law; it obstinately advances into the opening of an invisibility over which it will never triumph; insanely, it endeavours to make the law appear in order to be able to venerate it and dazzle it with its own luminous face; all it ends up doing is reinforcing the law in its weakness... (ibid).

This ‘presence’ of law ‘outside’ the subject, law as elusive, in ‘withdrawal’ and ‘concealment’, is the essence of law in a ‘disciplinary society’. Sovereignty, in Foucault’s formulation, now via the insight Blanchot offers, is an archaism that harks back to a “society of blood” (Blanchot, ibid, 83-6, 95-7). Power and the ‘political’, after *Discipline and Punish*, is opposed to the configurations of the “symbolics of

blood” (ibid, 86), the crudity by which the power of sovereignty as an organising principle manifests itself. But what of the decision to exclude a ‘subject’ from a juridical and political order? Is the society of ‘blood and soil’ an ‘anachronism’?

As Agamben puts it, and as we have observed in the preceding discussion, Foucault attempts to de-emphasise the questions “what legitimates power?” and “what is the state?” (Agamben, 1998, 5). But if this theoretical privileging of sovereignty is removed, what explains the point of intersection between “techniques of individualization” and “totalizing procedures”? (ibid, 6). Agamben attempts to address the nature of power as it is manifested at the point of intersection between “juridico-institutional” and “biopolitical” models of power (ibid). This is the question that Butler also attempts to address in relation to the detainees in Guantanamo Bay by exploring the convergence of Foucault and Agamben’s thought in relation to the production of the ‘biopolitical’ figure of the detainee in the camp. Before moving to consider whether the ‘original activity of sovereign power is the production of the biopolitical body’ (ibid) and its implications for understanding the relationship between sovereignty and law, the juridical order and its exception, I wish to briefly consider Carl Schmitt’s thought on the exception. The ‘exception’ – its complex position inside/outside the juridical order, is central to attempts by courts to position the actions of the ‘sovereign at war’ beyond the purview of law. As we observed in the assertions of the U.S Government with respect to the status of those captured during the ‘war on terror’, the ‘emergency’ and ‘state of war’ are relied on as the ground for claiming that the judicial branch of government cannot interfere with the actions of the ‘sovereign at war’. Although the question of jurisdiction has been ‘territorialised’ – that is, jurisdiction is determined on the basis of whether the

custodian/detainee is within the 'territorial' jurisdiction of a court - the U.S Government's rationalisation for 'indefinite' detention, and the possibility of the death penalty being administered by officials who are part of the Executive arm of government, continues to rely on the exceptionality of war asserted by the sovereign and acknowledged by the courts.

3.5 De-Positioning the Limit of the Juridical Order: Schmitt

It is not my objective to provide a full and thorough account of Schmitt's thought in this section. I merely wish to draw from Schmitt an account of the 'limit' between sovereignty/law. Schmitt's account of this limit, as I will go onto argue, harbours a paradox whereby a sovereign power to determine the exception which is regularly regarded as illimitable is in fact de-limited. This is the im-possibility of illimitable or 'infinite' sovereignty. It is this 'limit' of sovereignty/law that is at stake in the *habeas corpus* cases, and for the purposes of my argument in this Chapter, the 'limit' that I wish to *de-position* through Nancy's notion of 'abandonment' which I will consider below.

Schmitt's influential contributions on the nature of sovereignty and its position in relation to the legal order are crucial interventions in the secular drive of modernity (Norris, 2000, 3). The fundamental challenge for secularisation is the replacement of the source of morality and authority: what will take the place of a defunct deity or state-based religion in order to avoid the nihilism of an alienating unrestrained individualism? Secularisation is intimately connected with modern accounts of sovereignty because of this struggle to find a replacement for the authority of an

Immortal God: “secularisation for Schmitt is the attempt to cover over the moment of decision, a moment that his own analysis of the secular aims to lay bare” (ibid, 4). According to Schmitt, all “significant concepts of the modern theory of the state are secularised theological concepts” (Schmitt, [1922]1985, 36). The theological persists in modernity in the form of the structural place allocated to the sovereign as the ‘omnipotent lawgiver’ (Norris, 2000, 4-5).

In the Preface to the 1934 Second Edition of *Concept of the Political*, Schmitt emphasised that the decision on the ‘political’ is a decision on the ‘totality’ (ibid, 5). The political decision on friend/enemy and the decision on the exception are both decisions on the ‘totality’ of a ‘normalised’ social order and thus a decision on the ‘limit’. The sovereign occupies the place of the ‘borderline’ that constitutes the social order and law:

Sovereignty operates at the outermost sphere; it is here, at the borderline, that it establishes and violates limits in the same way that we saw the Preface [to the *Concept of the Political*] establish the political decision as being able to decide that something lies without its purview. The question of the sovereign is the question of the limit. If sovereignty decides upon its own limits, its decision cannot be bound by those limits. As politics is total in the Preface, so the sovereign, ... “must necessarily be unlimited”. The sovereign is the unlimited power that makes limits – or, in other words, the ungrounded ground of law. (ibid, 6)

It is in this sense that the sovereign event is far from ‘chaos’ – it is ‘the unlimited power that makes limits’. However, is it true to say, as Norris asserts, that ‘sovereignty decides upon its own limits’, that it is absolutely illimitable? How does

such a limit 'take place'? The sovereign, for Schmitt, demarcates 'law' and the 'political'. The illimitable production of a limit may have the 'appearance' of a border, but then it must be in relation to that which it 'effectively' delimits - 'law', or the 'political'. This 'taking place' of sovereignty would thus be returned to the sovereign as a limit on its illimitability. It is through this paradox that the impossibility of an illimitable sovereignty is revealed.

Not every emergency or decree is necessarily an exception: "the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind" (Schmitt, 1985, 12). Not only does order in the juristic sense prevail, the potential for the exception can be pre-figured or anticipated by the law that recedes. This is evidenced by the possibility of such a 'withdrawal': "the legal system itself can anticipate the exception and can 'suspend itself'" (ibid, 14). Indeed, this is assumed by liberal constitutional models that attempt to regulate the exception by enumerating the conditions or criteria by which law would suspend itself (ibid). However, this capacity of law to suspend itself troubles Schmitt who asks, without providing any clear response: "[f]rom where does law obtain this force, and how is it logically possible that a norm is valid except for one concrete case that it cannot factually determine in any definitive manner?" (ibid). The fact or instance of the exception, according to this Schmittian account, cannot be determined by law. However, law can anticipate the exception and suspend itself or withdraw. A 'dividable' juridical order in which law and sovereignty is co-present is an 'impossible possibility'. The juridical is (always already) divided by law's potential to withdraw and the sovereign's capacity to declare an exception. Let me elaborate this through Derrida.

What has been disclosed so far is that for Schmitt sovereignty is a divided concept. Sovereignty determines limits, but is in movement within and without a frame. In constituting a legal order, sovereignty is in movement towards a frame of reference, a normalised political condition. The illimitable thus moves towards and by way of a limit. It could also be said that the illimitable exists in and through a limit. As Derrida puts it, once the indivisible is divided, and the illimitable has been limited, sovereignty as the 'undivided' and 'unshared' becomes an impossible possibility. The singular plenitude of sovereignty is often asserted:

is it not the very essence of the principle of sovereignty everywhere and in every case, precisely its exceptional indivisibility, its illimitation, its integral integrity? Sovereignty is undivided, unshared, or it is not. The division of the indivisible, the sharing of what cannot be shared: that is the possibility of the impossible. (Derrida, 2003a, xx)

What is crucial here is the insight that whatever divides - and the sovereign limit divides - also "shares itself" in this partition (ibid). The singular plenitude of the sovereign decision thus deconstructs itself at the "frontier" of the division it cuts (ibid).

This 'sharing' of the limit belies the claim that sovereignty is beyond law. However, according to Norris, Schmitt persists with a 'metaphysical conviction' in identifying the place of the sovereign 'outside' or beyond law (Norris, 2000, 6). The role of the sovereign in determining the 'political' might similarly be rendered as a metaphysical gesture, though Norris does not explicitly do so. In both cases, what is metaphysical about the sovereign's position 'outside' law or as the figure who

determines the 'political' is that this sovereign occupies the structural place of God. This demonstrates, according to Norris, the persistence of theological structures in secularisation:

what is decisive here is the fact that "God" is the name of a structural position, one that cannot be done away with. Human beings must regard *something* as "the ultimate, absolute authority". Secularization names a change in the dominant cultural understanding of what that authority is. But by the same token it names the continuity of authority as such. ... Schmitt argues here not that God is inescapable, but the metaphysical position of authority that He occupies is. We might say that in the end Schmitt's political theology reveals itself to be a political metaphysics, one that insists upon the authority of the metaphysical and the metaphysics of authority. (ibid, 8, original emphasis)

However, it is difficult to square Schmitt's deployment of metaphysical structures with a conceptualisation of a sovereign who occupies an *indeterminate* position both inside and outside the legal order. Additionally, sovereignty pervades the totality of the political in a sense that is concrete and factual. The sovereign decides the 'political' by the decision on 'friend/enemy' and is infused in all instances of the juridical, even when the existing legal order is suspended in its entirety (Schmitt, 1985, 12). In one sense the sovereign is the limit, but sovereignty also oversteps all limits. Sovereignty "carries the limit with it in its movement as it carries itself" (Norris, 2003, 10). The relational character of an indeterminate sovereign who constitutes and occupies the place of a 'border', whose sharing divides and whose division renders it an impossible possibility, as Derrida put it, takes us towards a far more ample critique of sovereignty than to decry it as metaphysical.

The discussion of the ‘limit’ as it manifests in the exception has, thus far, been discussed in rather abstract terms. A more concrete treatment of the sovereign exception can be observed in Schmitt’s discourse on the decision on the ‘political’. I will briefly set this out here and bring it to bear on the *habeas corpus* cases. According to Schmitt, the “specific political distinction to which political actions and motives can be reduced is that between friend and enemy” (Schmitt, 1996, 26). The ‘enemy’, the limit figure of the political for Schmitt, is:

the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different, an alien, so that in the extreme case conflicts with him are possible. These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party. (ibid, 27)

The extreme possibility Schmitt is referring to is war – for a world in which ‘war’ is eliminated is, for Schmitt, a world without politics (ibid, 35). The centrality of the figure of the enemy is expressed thus:

[w]ords such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state, and so on, are incomprehensible if one does not know exactly who is to be affected, combated, refuted, or negated by such a term. (ibid, 31)

Consider, for instance, the principal authority being discussed in the U.S *habeas corpus* cases in relation to the detainees at Guantanamo Bay, *Johnson v Eisentrager* (1950). Justice Jackson who delivered the opinion of the majority stated:

citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed or

diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.(769)

It is the “duty of loyal support inherent in the citizen's allegiance” that makes the Government's obligation of protection a correlative (770). The dissenting judgment also drew comparisons with Saint Paul, but now to emphasise the extent of the ascent of civilisation rather than to assert a timeless nexus between protection of the subject and membership in a particular political community:

as the Court does point out, Paul was fortunate enough to be a Roman citizen when he was made the victim of prejudicial charges; that privileged status afforded him an appeal to Rome, with a right to meet his ‘accusers face to face’. Acts 25:16. But other martyred disciples were not so fortunate. Our constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.(798)

Though the majority wanted to distinguish ‘modern American law’ from the “time when outbreak of war made every enemy national an outlaw subject to both public and private slaughter, cruelty and plunder”, they maintained that:

our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to enemy governments. (769)

In a footnote the Court defined an ‘alien enemy’ as “the subject of a foreign state at war with the United States” (ibid). However, “enemies” can also be found ‘within’ the political community (as is the case with *Hamdi* (2002) and (2004)). Citizenship

does not preclude an individual from being treated as an ‘enemy’ or ‘unlawful combatant’, and thus subject to capture, detention, trial and punishment by military tribunals: *Ex Parte Quirin* (1942, 37), *Hamdi* (2004).

Time has not dimmed the significance of membership in a particular political community. The nationality-centred qualifier for being a subject of law would not be all that surprising if it were not for the rhetoric of universal human rights that is propounded by the governments of the U.K and the United States. The subject-of-rights is universal, a concomitant of the triumph of liberal democracy. But being a subject whose life is mediated by law is conditioned on being a member of a particular ‘nation’. It is within the limit of being included as a member of a ‘nation’, and within law’s jurisdiction, that the sovereign excess is apparently checked. The poverty of this discourse is that it conceives of sovereignty and law through the metaphor of inside/outside. I critiqued this approach in *Chapter One* (see discussion of Bartelson, *Chapter One*).

The discourses on the limits of law emerging from the *habeas corpus* cases treat sovereignty as an infinite power when it acts beyond the boundaries of law, beyond the limits of jurisdiction. But as we observed through Schmitt, the exception is in relation with the norm – the illimitable sovereign exists in and through a ‘limit’. What of the subject, the detainee, caught in the production and movement of this limit? Many characterisations are offered to describe the subject whose life is exposed to sovereign power – ‘bare life’ (Agamben), ‘abandoned being’ (Nancy), and ‘precarious life’ (Butler). As Foucault emphasised, the sovereign power over life and death must be considered in light of the emergence of modern techniques of discipline

and governmentality which enforce a 'norm' on a population. But there continues to be a sovereign exception that purportedly exceeds these norms of governance and regulation. I will now draw together the analysis of the limit examined through Foucault and Schmitt by considering Agamben and Nancy's treatment of the 'biopolitical' body as it is exposed to a sovereign will at the time of the exception. Agamben in particular has drawn heavily on Foucault and Schmitt. His thought is also an application of Nancy's work on 'abandonment'. It is thus convenient to consider Agamben and Nancy together.

3.6 Constituting the Limit: 'Abandoned Being'

The limit that separates a sovereign at war and the law of a particular political community is wrought through a being whose 'life' is 'abandoned' in the camp. 'Abandonment' is not the condition of being utterly beyond law. The juridical structure of 'abandonment', I argue, discloses that to be abandoned is to be inclusively-excluded from a 'political community' and juridical order. I have amply reviewed the *habeas corpus* cases (*Rasul and Odah* (2002); *Gherebi* (2003); and *Rasul* (2004)) in *Part A*. Recall the significance accorded to membership in political community, to being a citizen of the United States for instance (*Hamdi*, 2004). Recall also the contorted formulations of jurisdiction in the Federal Court decisions where sovereignty over a territory was reified in order to render it graspable as a segment of territory or as a temporal phenomenon (*Gherebi*, 2003). Here I will argue that the figure in the 'camp' is not merely 'outside' the juridical order or political community. The figure 'abandoned' in the camp is central to determining the limits of a juridical order and political community. The account of the significance of 'abandoned being'

as the figure that forms and occupies the limit of the juridical and political order is, in my view, most persuasively developed by Nancy (1993b). I will come to Nancy's treatment of 'abandonment' in the latter part of this section. However, it is worth approaching the significance of 'abandoned being' for thinking about the limit between sovereignty, law and a political community through Agamben's explicit treatment of this issue.

Agamben's thought on the sovereign decision engages with both the Foucauldian project of techniques of individualisation, the way power penetrates subjects' bodies, and the 'totalising structures of modern power' described by both Foucault and Schmitt (Agamben, 1998, 5-9, 11). It is an approach that is consistent with Agamben's general project in *Homo Sacer* to set out "the hidden point of intersection between the juridico-institutional and the biopolitical models of power" (ibid, 6). He states at the outset that the conclusion of his work is that the two analyses of the juridico-institutional and the biopolitical:

cannot be separated and that the inclusion of bare life in the political realm constitutes the original – if concealed – nucleus of sovereign power. *It can even be said that the production of a biopolitical body is the original activity of sovereign power.* In this sense, biopolitics is at least as old as the sovereign exception. Placing biological life at the center of its calculations, the modern state does nothing other than bring to light the secret tie uniting power and bare life, thereby reaffirming the bond ... between modern power and the most immemorial of the *arcana imperii*. (ibid, original emphasis)

There are immediate difficulties with this formulation. Fitzpatrick has drawn attention to the conundrum here of sovereignty being constituted by what sovereignty

produces (Fitzpatrick, 2001b, 2). Agamben explains that the production of 'bare life' as follows. The exclusion that founds Western politics is the suppression of 'bare life' (biological life or *zoe*). Drawing on the Aristotelian distinction between mere life (*zen*) and the good life (*eu zen*) (life in the *polis*), the suppression of mere life is an exclusion which is simultaneously an inclusion. This corresponds with the metaphysical task of distinguishing humans from animals on the basis that humans have the capacity not only to distinguish between pleasure and pain (voice (*phone*)), but also have language (*logos*) enabling them to ponder and decide what is fitting, proper and just (Agamben, 1998, 7-8). For Agamben the suppression of *phone* by *logos* in the politicisation of life is "the metaphysical task par excellence" (ibid, 8). From this analysis of the emergence of 'political life' through the suppression/burial of the biological or animal life of the 'self,' Agamben derives his central argument in *Homo Sacer*:

the fundamental categorical pair in Western politics is not that of friend/enemy but that of bare life/political existence, *zoe/bios*, exclusion/inclusion. There is politics because man is the living being who, in language, separates and opposes himself to his own bare life and, at the same time, maintains himself in relation to that bare life in an inclusive exclusion. (ibid)¹⁴⁵

This is where Agamben fundamentally departs from Schmitt's account of the emergence of the juridical order and concept of the political as being based on the sovereign decision to exclude or destroy the enemy. This sovereign decision, for Agamben, is not a thorough or complete exclusion. Instead, the juridical order and the subject as a political animal emerge through the dynamic of the 'relation of exception', where any exclusion is simultaneously an inclusion.

¹⁴⁵ For Agamben, the central distinction informing western political discourse from the time of the Greeks is that between 'bare life' (natural life) and 'political life', *zoe/bios*. Agamben argues that the decisive event in modernity is the politicisation of bare life (Agamben, 1998, 4).

The 'relation of exception' is the core insight of Agamben's theory on the structure of sovereignty, and the constitution of the political. The relation of exception demonstrates the potentiality of law to maintain itself as an absence:

If the exception is the structure of sovereignty, then sovereignty is not an exclusive political concept, an exclusive juridical category, a power external to law (Schmitt), or the supreme rule of the juridical order (Hans Kelsen): it is the originary structure in which law refers to life and includes it in itself by suspending it. Taking Jean-Luc Nancy's suggestion we shall give the name *ban* (from the old Germanic term that designates both exclusion from the community and the command and insignia of the sovereign) to this potentiality (in the proper sense of the Aristotelian *dynamis*, which is also always *dynamis me energein*, the potentiality not to pass into actuality) of the law to maintain itself in its own privation, to apply in no longer applying. (ibid, 28)

The 'life' exposed to the sovereign 'ban' is '*homo Sacer*' or 'bare life'. This is the life that can be 'killed with impunity' but cannot be sacrificed – that is, it is beyond the calculations of profane law and divine law (ibid, 72, 82-3). Though law is not utterly absent in this formulation, its presence, if this formulation can be strained, is as an absence. As Strachan-Davidson puts it, *homo sacer* is no ordinary offender or criminal – he is 'cut off from human society'.¹⁴⁶ There is therefore 'a double

¹⁴⁶ James L. Strachan-Davidson (1912), 7. However, Strachan-Davidson makes the point in Volume II that the killing without judicial proceeding and with impunity of a banished man caught on Roman ground was rather more likely in theory than in practice as it is irreconcilable with the rule of law: ibid., Vol: II, 33-4. However, the possibility of the rule of law and killing with impunity coexisting need not be discounted in light of Schmitt's account that the exception does after all take itself outside the rule without descending to chaos. It should also be noted that there is a literature examining the plausibility of *homo sacer* as a figure of Roman law which takes issue with Strachan-Davidson and others: see Harold Bennett (1930) 5-18. Bennett calls into question the interpretations of Roman law by Strachan-Davidson, ibid, pp. 7-8. Bennett also questions the status of 'sacer' proposed by W. Warde Fowler (1920) 15-24; Bennett, ibid, 8. For a critique of Agamben's deployment of this archaic Roman figure, see Fitzpatrick (2001b, 4-8).

exclusion' that constitutes the zone inhabited by 'bare life'. It is neither sacralised life mediated by divine law, nor is it regulated by profane law in the form of the prohibition of homicide – that is, he can be killed with impunity but not sacrificed:

[t]he sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, and sacred life – that is, life that may be killed but not sacrificed – is the life that has been captured in this sphere. (Agamben, 1998, 83)

Why is the 'life that can be killed and not sacrificed' nonetheless 'sacred life'? The answer to this, for Agamben, also offers the parallel between the originary politicisation of life and the structure of the exception:

[j]ust as the law, in the sovereign exception, applies to the exceptional case in no longer applying and in withdrawing from it, so *homo sacer* belongs to God in the form of unsacrificeability and is included in the community in the form of being able to be killed. *Life that cannot be sacrificed and yet may be killed is sacred life.* (ibid, 82)

The plausibility of Agamben's deployment of the antiquarian figure of *homo sacer* is not the subject of my study and so I do not intend to investigate whether it carries the weight of conclusions that Agamben proposes. What it does offer, however, is a means of characterising a range of figures, of 'life' distinct from 'political being', inclusively excluded from a juridical order and a political community.

What is useful for my purposes (and Butler, (2004) and Gregory (2004) have made similar use of Agamben) is that the figure of *homo sacer* is a symbol of the irresolution of the 'limit' between sovereignty and law. It is a figure through which the 'limit' can be understood as a relation – the relation of 'inclusive exclusion'. It is

in this way that the detainee in the ‘camp’, the ‘unlawful combatant’ captured during the indefinite ‘war on terror’, can be regarded as inhabiting a zone of indistinction inside and outside the calculations of the sovereign and the juridical order. For instance in *Hamdi* (2004) we observed that the Supreme Court was more than willing to be cognisant of the ‘exception’ – the fact that the Executive is prosecuting a war, and that any intervention made by the judicial branch of government must not overly hinder the exigencies of this war. The formulation of ‘due process’ in the limited terms that they were characterised marks the limit between sovereignty and law. This limit is wrought through the ‘positioning’, treatment and condition of the life of the ‘enemy combatant’. The ‘enemy combatant’ whose life is differentially mediated by civil law marks the ‘limit’ of jurisdiction. The ‘abandonment’ of the detainee – which is always already an inclusive exclusion – demonstrates the link between the ‘relation of jurisdiction’ and the ‘relation of exception’ discussed above. This argument can be developed further by considering Nancy’s conception of ‘abandoned being’ more fully.

The relation between law, sovereignty and the figure banished from the political community can be taken up through the concept of *abandonment*. The figure of ‘abandoned’ life harbours the antinomies of sovereignty and law. The etymological root of ‘abandon’ is ‘*bandon*’ (*a-bandon*) - and ‘*bandon*’ means “jurisdiction and control” (OED). To be abandoned is to be taken ‘beyond’, cast ‘outside’ jurisdiction. But to be abandoned is also to be free from constraint or convention, to relinquish to the control of another, or to desert, that is, to leave behind or leave without help. To abandon, then, is to be relieved of certain modes of control and protection. Another way of putting it is to say that abandonment involves being

banished from a particular jurisdiction. But to be cast outside a certain order is in another sense to be subject to an order. Abandonment is a point of ambivalent inter-relation that takes the form of an inclusive-exclusion which Agamben has explored in *Homo Sacer* (1998, 28-9). Abandonment manifests what Agamben terms the 'relation of exception' (of being inside *and* outside the law) and characterises the structure of sovereignty: "the relation of exception is a relation of ban" (ibid, 28). This is why abandonment cannot be conceived as an instance of absolute sovereignty (sovereignty as One, as monistic) or as the condition of a being entirely unmediated by law. As Agamben argues, it is not possible to say whether abandoned being is inside or outside the juridical order. The 'limit' of law is fashioned on the body (that may not be) brought before it. For Agamben "the originary juridico-political relation is the ban" (ibid, 109). This is a thesis not only "concerning the formal structure of sovereignty but also has a substantial character, since what the ban holds together is bare life and sovereign power" (ibid). Proposing this argument as a counter to the 'social contract' accounts of the origins of the state in Hobbes and Rousseau, Agamben argues that:

What has been banned is delivered over to its own separateness and, at the same time, consigned to the mercy of the one who abandons it – at once excluded and included, removed and at the same time captured.

...

The ban is the force of simultaneous attraction and repulsion that ties together the two poles of the sovereign exception: bare life and power, *homo sacer* and the sovereign. Because of this alone can the ban signify both the insignia of sovereignty ... and expulsion from the community. (ibid, 110-111)

This is what qualifies abandoned being as the figure who lies at the foundation of the political and the juridical:

The banishment of sacred life is the sovereign *nomos* that conditions every rule, the originary spatialization that governs and makes possible every localisation and every territorialization. (ibid, 111)

Abandoned life thus lies at the limit-point of jurisdiction. Thus the courts administering the 'rule of law' of a particular political community cannot exempt themselves from responsibility for the figure of the abandoned detainee because the detainees' abandonment defines the limits of the 'rule of law'. There is nothing more proximate to 'jurisdiction' than the figure 'abandoned' in the camp. Let me develop this assertion of a link between 'abandonment' and the limits of sovereignty and jurisdiction.

To be abandoned from law is (as we have seen in the cases examined above) also to be abandoned *by law*. That is, the condition of a life 'unmediated' by civilian courts is a function of variable judicial constructions of the notions of 'territorial jurisdiction', 'ultimate sovereignty', 'within jurisdiction' and 'jurisdiction and control' (these are the determinants of jurisdiction in the *habeas* cases examined above). But to be abandoned by law, understood through Nancy's extensive exploration of the question, is to be abandoned to a law: "one always abandons to a law" (Nancy, 1993b, 44). But what is this *law* that one abandons to? It is not the posited law of prescription or norms derived through convention - Nancy is quite explicit about this. This 'other law' is a reference to the sovereign-as-law, the law of the sovereign that "borders and upholds a legal universe" (ibid). In his essay "Abandoned Being" Nancy names 'sovereignty' as this 'other law':

[t]he origin of “abandonment” is a putting at *bandon*. *Bandon* (*bandum*, *band*, *bannen*) is an order, a prescription, a decree, a permission, and the power that holds these freely at its disposal. To *abandon* is to remit, entrust, or turn over to such a sovereign power, and to remit, entrust, or turn over to its *ban*, that is, to its proclaiming, to its convening, and to its sentence. (ibid) (underlined emphasis added)

To abandon to the law of a sovereign power is also to abandon to the law of a community – to the ‘juris-fiction’ that I discussed above. That is, to be abandoned is not to be entirely alone at the mercy of a ‘singular’ sovereign. As Nancy writes in *The Inoperative Community*, finite being always presents itself “at a *hearing* and before the judgment of the law of community, or, more originally, before the judgment of community as law” (Nancy, 1991, 28). Being banished does not amount to coming under a particular provision of the law. Abandonment constitutes the legal order:

[t]urned over to the absolute of the law, the banished one is thereby abandoned completely outside its jurisdiction. *The law of abandonment requires that the law be applied through its withdrawal. The law of abandonment is the other of the law, which constitutes the law.*

Abandoned being finds itself deserted to the degree that it finds itself remitted, entrusted or thrown to this law that constitutes the law, this other and same, to this *other side of all law that borders and upholds a legal universe*: an absolute, solemn order, which prescribes nothing but abandonment. Being is not entrusted to a cause, to a motor, to a principle; it is not left to its own substance, or even to its own subsistence. It is-in abandonment. (Nancy, 1993b, 44) (emphasis added)

Abandoned 'life' produces the law. It is in this way that the abandoned subject is before the law (and the political) in the starkest possible way. It is not possible to determine whether the condition of abandonment is one of fact or right. It is always already both. Jurisdiction is, as I argued above through Nancy, 'juris-fiction'. Abandoned being marks the 'limit' of sovereignty and law – but the limit as an ambivalent phenomenon. It is for this reason that the 'relation of jurisdiction' and the 'relation of exception' must be considered together.

* * *

In this Chapter I have considered the question of the 'limit' which separates sovereignty and law through the notion of jurisdiction as it has been variously considered in the *habeas corpus* cases in relation to the detainees in Guantanamo Bay. These cases disclosed, in a setting where sovereign power is deployed beyond the confines of the nation-state and formal conceptions of 'sovereign territory, that the finitude of sovereignty is both conceptually and actually delimited through its relation with law. Despite the assertion that a sovereign at war is beyond law, the concept of 'jurisdiction' and law's account of its limits, reveals the relation between sovereignty, law and the political. The 'political' figured in the *habeas corpus* cases in at least two senses. The sovereign goes to war in the name of defending and protecting the 'political' against the 'global threat of terrorism'. The courts when determining the limits of 'due process' were heavily deferential so as to not to hamper the sovereign at war with onerous standards in relation to how detainees should be treated (*Hamdi* (2004)). Moreover, the Supreme Court, though acknowledging that the writ of

habeas corpus should be available to citizens and aliens (*Rasul*, 2004), addressed its decision on ‘due process’ to the ‘citizen detainee’ (*Hamdi*, 2004).

The treatment of the *habeas corpus* cases also revealed that an infinite notion of sovereignty cannot be sustained. Even when sovereign power registers its greatest excess, asserting the prerogative to torture and/or summarily execute the detainee in the name of defending the polity, the question of jurisdiction, the question of whether the detainees ‘life’ will be mediated by civil law, must at the very least be addressed. Sovereign violence comes ‘before the law’ in both senses of that phrase. That is not to say that law has been effective in limiting sovereign excesses (for details of systematic torture in Guantanamo Bay and Abu Ghraib, Baghdad, see Hersh 2004a and 2004b). It has been disclosed in this Chapter that the ‘presence’ of sovereignty is sustained in and through ‘jurisdiction’. And the figure whose ‘life’ discloses this is the being ‘abandoned’ from the juridical order and political community. To that extent, membership in political community, and its concomitant, the extent to which one’s life is mediated by law, determines the ‘limit’ of sovereign power.

I characterised the decisions on jurisdiction as instances of ‘juris-fiction’ – the courts’ performative positioning of the limit of what is within and beyond their purview. The finite and infinite character attributed to sovereignty in these decisions was identified. The notion of the ‘limit’ associated with the sovereign exception was considered through the thought of Schmitt and Agamben and I argued that the ‘limit’ is the space of an ‘inclusive exclusion’. There is an attempt to ‘capture’ the detainee through the binaries of civilisation/barbarism, Christianity/Islam, sacred and profane law. But the separation between each of these oppositions is not a crude constitutive

exclusion. The exclusion takes the form of the original suppression of 'bare life' in political community. The 'subject' of the camp is neither inside nor outside the juridical order or political community. For example the 'barbarism' of the 'Muslim fundamentalist' is not at the margins or 'outside' a 'civilisation' that promotes democracy and human rights. The Taliban and al-Qaeda are *central* to the neo-imperial enterprise. This was disclosed through the ambivalent position of the 'abandoned' detainee both inside and outside the juridical order.

The detainees currently being held at the U.S Naval Base in Guantanamo Bay bear the sovereign *ban* of a neo-imperial nation-state. Though they have now been given access to U.S courts, their detention will be subject to the exigencies of a war that may be 'without end'. Such an illimitable sovereign power, I argued, is an impossibility. The courts, by varied and contradictory pronouncements on the finitude of jurisdiction have placed 'enemy combatants' at the mercy of diminished requirements of 'due process'. In the face of what is claimed to be an illimitable sovereign war, the courts are indeed in a 'withdrawal' anticipated by Schmitt. This withdrawal paradoxically delimits the plenitude of the illimitable sovereign. The detainees' shackled bodies and the cages within which they are contained and tortured, manifest a reassertion of a sovereign power that Foucault regarded as in decline with the emergence of 'governmentality' and 'biopower'. That is not to say that Foucault's insights are diminished. As Butler has rightly pointed out, the administration of the 'exception' is undertaken by a myriad of officials.

The 'limit' between sovereignty and law may be discerned through the detainee. The detainee is produced by a combination of a sovereign power that

prosecutes a 'war without end' and the extra-judicial identification of those who threaten the national interests of the United States. Detention camps and military tribunals are an 'outside' at the *centre* of a new imperial project. The line that separates what is 'inside' the juridical order from what is 'outside' it, a 'limit' I examined through the notion of jurisdiction, is linked to a 'finite' conception of sovereignty that is nowhere to be found. The finitude of sovereignty, as I argued in the preceding Chapters, and now in relation to the 'limit' that separates sovereignty from law, is always already in relation with law, territory, community, 'nation'. The conceptual 'limit' that is said to separate sovereignty never succeeds in containing it. Sovereignty marked-out as territory, 'people' or what is 'outside' law reaches beyond its 'finitude' precisely at the moment when it is regarded as a containable 'essence'. The significance of 'abandonment' for understanding the in-finitude of sovereignty is that it reveals how membership in a political community marks the limit between sovereignty and law. The juridical cipher of this dynamic is 'jurisdiction'.

Looking ahead now - I began this Chapter by asserting a link between the colonial gestures that are part of the 'postcolonial' enterprise in Australia, and the colonial attributes of a neo-imperial power in the form of the United States. We observed that what is common to the colonial and neo-imperial instantiations of sovereignty is the attempt to conceive of sovereignty through an 'essence' or as a monistic phenomenon. Sovereignty in both contexts is regarded as finite and infinite. The sovereign at war, despite claims to transcend spatial and temporal limits, is always already in relation with law and a political community. This resonates with the relation between sovereignty and law examined in the first two Chapters. Notwithstanding this evidence of the contingent and 'relational' nature of what is

regarded as universal, ungraspable and infinite, a plethora of claims are made about a deterritorialised 'global' sovereignty, a condition without an 'outside' or elsewhere. Legal theorists and political philosophers have been claiming that 'sovereignty' is in decline in a new era of 'deterritorialised global empire' (Hardt and Negri, 2000; Walker 2003; and more nuanced claims about the possibility of 'world' and universal law by Nancy, 2003c, 2003d; and Derrida, 2003b). At the same time, political and sociological discourses are replete with claims of an epochal clash between 'civilisation and barbarism', the 'West' and the 'Muslim World' (Ignatieff, 2003a and 2003b; Dallmayr, 2002; Sassen, 2002; Urry, 2002). Sovereignty is, then, at once universal and particular. It is deterritorialised, without finite existence or an 'outside', and simultaneously marked by an epochal clash which is nothing but contingent on the imperial expansions of an extravagant and rapacious sovereign. These claims mark the 'outer-limits' of thinking on sovereignty. In the next Chapter I will draw together the colonial, 'postcolonial' and neo-imperial modes of sovereign power examined in the preceding Chapters by considering the concept of sovereignty in a 'world' that is apparently without 'limit'.

CHAPTER 4

De-Positioning Imperial Sovereignty

The world is at war again, but things are different this time. Traditionally war has been conceived as the armed conflict between sovereign political entities, that is, during the modern period, between nation-states. ... [T]he sovereign authority of nation-states, even the most dominant nation-states, is declining and there is instead emerging a new supra-national form of sovereignty, a global Empire... .

Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (2004), 3.

An event or an invention is possible only as im-possible. The im-possible never appears or announces itself as such.

Jacques Derrida, "The "World" of the Enlightenment to Come (Exception, Calculation, Sovereignty)" (2003b, 35).

Throughout this thesis I have been examining the 'position' of imperial sovereignty in relation to law. We observed that the general problematic posed by this relation is that sovereignty is a power that is required to be at once 'finite' and 'infinite'. In the Australian 'postcolonial' context for instance, an 'infinite' (illimitable, non-justiciable) sovereign power was necessary to ground 'past' and 'present' law and society. We observed that this 'infinite' sovereign power also had to be capable of being rendered 'finite' (an event that took place 'back then') so that the imperial sovereign excesses could be disavowed by an emergent 'postcolonial' law and society. This concept of '*in-finite*' sovereignty (at once finite and infinite) initially extracted from the Australian 'postcolonial' context was later generalised through a more current instance of law's attempt to grapple with a sovereign 'excess' at a time of imperial expansion. I argued that the U.S Courts' attempts to delimit their capacity to assess the legality of indefinitely detaining persons captured during the 'war on terror', the decisions on 'jurisdiction', also involve an in-finite conception of sovereignty. The question of jurisdiction, I argued, is a question of the 'limit' of

sovereignty. The finitude of sovereignty is marked by its relation to jurisdiction - law's inscription of its own limit. In both the Australian 'postcolonial' context and the U.S courts' decisions on jurisdiction, a 'law of the land', a law *of* community and 'nation' was invoked in order to 'set' the 'limit' between sovereignty and law. Thus we observed a variety of ways in which sovereignty is tied to the particularity of a nation-state. It is the stability of 'nation' (in *Mabo* (No 2)) or the exigencies of 'national security' (in relation to the 'war on terror') that are invoked to sustain a limit between sovereignty and law. In short, I have elaborated a concept of in-finite sovereignty which is sustained in and through the 'limits' of political community in the form of the nation-state. It is thus appropriate to direct attention in this final Chapter of my enquiry, to the claim that sovereignty and political community have now surpassed being delimited by the nation-state in an era of 'globalisation'.

The significance of the nation-state as the locus and symbol of sovereignty, the entity in whose name sovereign power is made present, is being challenged (see epigraph from Hardt and Negri, 2004, above). Contemporary discourses on the process called 'globalisation' are awash with assertions about the exhaustion of the sovereignty of the nation-state. Juridical authority is apparently 'deterritorialised', the imperial 'frontier' is without limits (Hardt and Negri, 2000, xii). Others argue that "global space" assumes the character of a "frontierland" and "we are all inside with nothing left outside" (Bauman, 2003, 83-4). These millennial claims apparently herald an epochal shift marked by the emergence of 'global' or 'supra-national' authority in the aftermath of the Cold War. Sovereignty without limits, an infinite sovereign reign and a borderless 'world' is supposedly evidenced by a dissipating nation-state, pre-emptive military intervention, purportedly universal values of

democracy and human rights, and borderless flows of capital and communication (Hardt and Negri, 2000 and 2004).¹⁴⁷ Such a borderless ‘world’ is premised on the demise of the world system of sovereigns which was conceptually sustained by the distinction between ‘internal’ and ‘external’ sovereign authority and capacity.¹⁴⁸ In this Chapter I will consider whether sovereignty has indeed moved beyond the delimited bounds of the nation-state.¹⁴⁹ The bulk of my engagement with the claim that the sovereignty of the nation-state is coming to an end, that a new, ‘worldwide’ imperial sovereignty has emerged, will be through a discussion of Hardt and Negri’s *Empire* (2000).

Why investigate Hardt and Negri’s instantiation of ‘imperial sovereignty’ instead of others, and why at this stage of the argument? The principal reasons are two-fold and they both relate to the substance of how I have conceptualised sovereignty thus far.¹⁵⁰ First, and as I have already indicated in passing, Hardt and Negri fail to grasp the *infinite-finitude* of sovereignty. Reducing their argument to the terms of my enquiry for the time being, their assertion is that sovereignty is no longer ‘finite’ – that is, associated with territory, ‘people’, ‘nation’, coloniser, the Occident or the state. On their account, the sovereignty of the nation-state is coming to an end. Indeed, any attempt to grapple with particular ‘postcolonial’ instances of sovereignty is to remain steeped in the dialectics of colonial sovereignty (Hardt and Negri, 2000,

¹⁴⁷ A useful collection of the literature in which these claims abound can also be found in Aronowitz and Gautney (eds.) (2003), *Implicating Empire: Globalisation and Resistance in the 21st Century World Order*.

¹⁴⁸ For a review of this literature on internal/external sovereignty and a critique of spatial metaphors in conceptualising state power and trans-national authority, see Bratsis (2003), “Over, Under, Sideways, Down: Globalisation, Spatial Metaphors and the Question of State Power”.

¹⁴⁹ My discussion of Hardt and Negri’s arguments in relation to the emergence of the juridical concept of ‘Empire’ is not intended to be exhaustive. I will confine my explication of their arguments to what is necessary to call into question the idea of ‘worldwide’ sovereignty.

¹⁵⁰ In this paragraph I am only providing a broad characterisation of Hardt and Negri’s argument. I will return to deal with these assertions in considerable detail below.

114, 137). I will pay particular attention to this aspect of Hardt and Negri's argument as it directly pertains to the thesis I have been advancing. Instead of discrete sovereign entities which re-present a particular political community and its law, they herald an *infinite* form of sovereignty called 'Empire'. Their thesis directly contradicts my account of the infinite-finitude of sovereignty – my argument being that the existence of sovereignty is a process of its being-delimited in relation to law and with respect to a particular political community – an infinite experience of sovereign finitude. I have argued that sovereignty is a singularity which is always already plural (Nancy, 2000b and 2000c; recall the exposition in *Chapter One*). The shorthand mode of expressing this is as the *infinite-finitude* of sovereignty. Given Hardt and Negri's thesis contradicts the core idea in my argument (they assert the end of a delimited concept of sovereignty), and for that reason alone, their arguments must be carefully considered and addressed.

But there is also a second, more affirmative reason for considering imperial sovereignty through Hardt and Negri's articulation of it. I wish to use Hardt and Negri's account of 'Empire' as a point of departure in order to chart the im-possibility of 'globalised' imperial sovereignty. This is the task of *de-positioning* 'imperial sovereignty' which I will take up in this Chapter. I will consider whether 'globalisation' is accompanied by a new form of imperial sovereignty which, in Nancy's terms, is a case of authority becoming 'worldwide' (Nancy, 1997, 3). Has a mode of 'worldwide' sovereignty emerged? Is 'worldwide' authority an instance of the 'end of sovereignty' or sovereignty as 'Nothing'? In *Chapter One* I argued, along with Nancy and Lefort, that sovereignty should be 'Nothing'. The 'becoming worldwide' of sovereign authority marks the outer limits of thinking on sovereignty.

Nancy sees “the philosophical problem of becoming-worldwide as an antidote to a globalization merely based on capital” (Devisch, 2002, 386). Recall for instance that Nancy has argued that the plural spacing of the world “*is itself the empty place of sovereignty*” (Nancy, 2000c, 137 (original emphasis); see my discussion in *Chapter One*). Comparing Nancy’s account of authority becoming ‘worldwide’ with Hardt and Negri’s account of ‘Empire’ will enable us to explore what it means for sovereignty to be ‘Nothing’, for sovereignty to occupy a ‘non-place’ (Nancy, 2000c, 137).

The difference between Nancy and Hardt and Negri’s approach to the ‘end of sovereignty’ must be stressed at the outset. Nancy seeks an end to sovereignty as a mode of encompassing, delimiting, re-presenting the being-together of beings. For Nancy, ‘community’ should not be delimited by the being-in-common represented through sovereignty. Sovereignty should be ‘Nothing’, a ‘non-place’ (Nancy, 2000c, 139; and generally 2000b). Hardt and Negri in contrast announce the end of the sovereignty of the nation-state, only to herald the emergence of a new ‘global’ mode of sovereignty they call ‘Empire’. Empire encompasses all modes of social, economic and political being – sovereign power expands its boundaries to “envelop the entire globe” (Hardt and Negri, 2000, 189). What is proclaimed as a ‘new’ imperial logic of global rule has implications for enterprises which seek a ‘postcolonial’ or anti-imperial juridical order. As Hardt and Negri claim that the “end of history” has ushered in “the reign of peace”, and that imperial, inter-imperial and anti-imperialist wars are over (ibid), it is apt to question what bearing these claims may have on ‘postcolonial’ and anti-imperial enterprises that are concerned with resisting ongoing forms of imperial domination. This questioning will return us to the problem posed at

the beginning of this enquiry – how might the ‘position’ of sovereignty in relation to law be conceived in order that it facilitates a ‘postcolonial’ and anti-imperial enterprise. In the latter part of this Chapter I will address how an account of in-finite sovereignty can inform a ‘postcolonial’ and anti-imperial project.

The questions addressed in this Chapter, then, are these: has sovereignty, which thus far I have asserted is both finite and infinite (in-finite), surpassed its delimitation in relation to a particular ‘political community’, namely the nation-state? In the idiom of my analysis, has ‘imperial sovereignty’ so thoroughly encompassed the ‘world’ that it now takes the ‘form’ (if this is still possible) of a ‘*finite-made-infinite*’?¹⁵¹ Unsurprisingly, I will contend that imperial sovereignty remains in-finite – both finite and infinite. The proliferation of claims that a new ‘imperial sovereignty’ has surpassed the nation-state, that it is an infinite sovereignty with ‘no outside’, a *finite-made-infinite*, results from the failure to grasp the infinite-finitude of sovereignty.

4.1 ‘Worldwide’ Sovereignty ?

According to Hardt and Negri the decline of the modern concept of sovereignty (a transcendent sovereign) can be explained by Capital’s demand for new mechanisms of control (Hardt and Negri, 2000, 325-339).¹⁵² While ‘modern’ sovereignty operates through the creation and maintenance of “fixed boundaries

¹⁵¹ I deploy this phrase because it captures Hardt and Negri’s assertion that ‘Empire’ is in fact a particular juridical order (the American Republic), and a particular mode of production (capitalism) that has become thoroughly ‘global’. Hence a ‘finite-made-infinite’. Their assertion is accompanied by the claim that the ‘political’ is also made ‘infinite’ through the notion of the ‘multitude’. I will shortly elaborate each of these elements in their assertion of ‘Empire’.

¹⁵² Future in-text page references will be to Hardt and Negri, *Empire* (2000).

among territories, populations, social functions and so forth”, Capital now “tends toward a smooth space defined by uncoded flows, flexibility, continual modulation, and tendential equalization” (325, 327).¹⁵³ The character of modern sovereignty as a delimited entity (the nation-state) thus clashes with Capital’s demand for decentralisation and deterritorialisation (326-327). The ‘decentralised’ rule demanded by the immanent flows of capital are expressed through Foucault’s notion of ‘governmentality’ (327-8). When modern sovereignty transforms into governmentality, power is ‘immanent’, and regimes of control “flatten differences to a common plane” (ibid, 339).¹⁵⁴ In sum, for Hardt and Negri the emergence of Empire is marked by the decline of transcendent sovereign authority embodied in the nation-state. Empire is marked by the emergence of immanent authority driven by the “axiomatic” of Capital (326). It is this ‘becoming worldwide’ of sovereign authority, the character of power when it encompasses the ‘world’, that I wish to interrogate

¹⁵³ I do not wish to take up the political economy of ‘Empire’ as it is beyond the scope of my analysis. Here I am solely interested in drawing out from Hardt and Negri’s thought the juridical character of ‘global sovereign authority’ at a time of ‘Empire’. For an excellent account of the centrality of the ‘nation-state’ for capitalism, see Ellen Meiksins Wood, *Empire of Capital* (2003). Wood explicitly rejects Hardt and Negri’s argument about the ‘smooth world’ called into being by capitalism. I will consider Wood’s argument in more detail below.

¹⁵⁴ Recall here my extensive discussion of Foucault and ‘governmentality’ in the previous Chapter. I made the point that the emergence of diffuse sites of power (authority exercised through modes of ‘normalisation’), does not do away with the juridical problematic of the ‘archaic’ sovereign, the sovereign of ‘blood and soil’. Hardt and Negri’s account of Foucault’s thought, like much else, is crude and reductive. The key philosophical influences on Hardt and Negri’s thought are Spinoza and Deleuze. It is beyond the scope of my enquiry to give more detail on Spinoza and Deleuze. But see Negri, 1993, for an elaboration of the Spinozist aspects of Negri’s thought. Inspired by these philosophers, Hardt and Negri seek to overcome the opposition between transcendent and immanent sources and expressions of power. In the case of ‘Empire’, where previously the ‘nation-state’ was the ‘transcendent’ expression of the ‘immanent’ will of the ‘people’, the scenario now is that the place/source of power is decentred, ‘globalised’ through the notion of the ‘multitude’, and thus incapable of being captured in a transcendent form of Power/Sovereignty. Though ‘Empire’ includes the overwhelming military Power (*Potestas*) of the ‘one’ super-power, the United States, this is one among several loci of diffuse modes power (*potentia*). This is a basic summary of Hardt and Negri’s notion of ‘Empire’. More detail will be given, as it becomes necessary for the purposes of my argument.

through the thought of Nancy. As we will shortly see, Nancy expressly addresses the nature of ‘authority’ (what he calls ‘sense’) in a time of ‘empire’.¹⁵⁵

What does it mean to claim that authority has become ‘worldwide’? In Nancy’s elaboration of the notions of ‘sense’ and ‘world’ we will find a nuanced account of how ‘authority’ is becoming ‘worldwide’. This account is informed by Nancy’s urge to think sovereignty as ‘Nothing’ – a concern I highlighted in *Chapter One* and to which I will return at the conclusion of this Chapter. An account of authority becoming worldwide’ will sustain a discussion, later in this Chapter, of how ‘imperial sovereignty’, far from being an illimitable force with no ‘outside’, is in fact still delimited in the form of a nation-state’s sovereignty that is extended beyond its ever-present ‘limits’. This is not to deny that imperial extensions of power and a decentralisation of authority are taking place. Rather, my intention is to emphasise that ‘imperial sovereignty’ or ‘empire’ must be understood as the (infinite) plurality of finitudes, what I call *infinite-finitude*. This is the opposite of what is asserted by Hardt and Negri, whose notion of ‘Empire’ is always already ‘infinite’ (an ‘open frontier’ where there is no ‘outside’). Nancy has developed his thinking on the ‘becoming worldwide’ of authority through an account of what he terms the ‘sense’ of the ‘world’. It is thus apt to begin with a brief elaboration of what Nancy means by the ‘sense’ and ‘world’.

¹⁵⁵ Note the different notation here of ‘empire’ and ‘Empire’. The former refers to Nancy’s account of authority becoming ‘worldwide’, and the latter to Hardt and Negri’s assertion of a new form of sovereignty and juridical order that encompasses the world.

4.1.1 *'Sense of the World'*

What Nancy means by 'sense' is *value* (Librett, 1997, ix). The current crisis of 'sense' lies in the fact that 'sense' now inhabits the 'border' between two expended poles from which authority was derived - 'absolute value' (myth) and 'relative value' (the absolute absence of value – nihilism) (ibid). In modernity the 'theological' as an absolute source of value is replaced with the 'theologicopolitical', another 'absolute' source of sense.¹⁵⁶ The 'theologicopolitical' is a "laicized theology" symbolized through notions such as people, history, humanity, nation (Nancy, 1997, 105). Value or authority in the 'theologicopolitical' era is derived from a category that transcends the 'singular plural' exposure of beings – such as the 'subject of history', 'membership' through belonging to people, nation, humanity and so on. 'Nation', 'property', 'people', 'production' become the 'absolute sense' of a 'subject' whose history becomes politics (ibid).¹⁵⁷ The 'West', a category that Nancy seeks to problematise, saw itself as the "keeper of a world view or a sense of the world" that was expressed through 'humanity', 'nation', property and their proprieties (Nancy, 2003c, 37). The West believed that 'humanism' was "its humanism" (ibid). But representations of the source of value as "'man', 'reason', 'right', 'science', 'God', 'history' etc" are exhausted (Nancy, 2003d, 53). This exhaustion of the 'theologicopolitical' accounts of the sense of the world also results from the dissipation of the opposition between Occident and its others – a conclusion that requires more elaboration given the current wars in the name of 'humanity' and 'democracy' which suggest the persistence of 'world authority' concentrated in the

¹⁵⁶ This is articulated early in the twentieth century by Carl Schmitt, see: Schmitt, 1922 and my discussion of his thought in *Chapter Three*.

¹⁵⁷ Recall the delimiting role of nation, property, 'native' and traditional community in *Mabo (No 2)* discussed in the Chapters 1 and 2.

geopolitical 'centre' of the 'West'. Nancy, in particular, calls such oppositions of a geopolitical centre/margin into question.

Is the 'end' of a 'sense of the world' which is based on 'theologicopolitical' accounts a speculation greatly removed from the reality of wars currently being prosecuted against 'bad leaders' and 'Islamic fundamentalism', and in the name of 'democracy', 'human rights' and 'civilization'? Not according to Nancy who argues that what is represented as a 'war of civilisations' in Afghanistan, Pakistan, Iraq signifies a "Western world ... in a permanent state of internal war, which is no longer the old war of sovereign States" (ibid, 51). For Nancy these wars manifest a civilisation "coming up against its own limit" (ibid, 52). A civilization which comes up against its limit will lead to a change of civilization which may have three forms: the shifting of poles of civilization where Asia, Africa or Latin America may emerge as other poles; the aggravation of ethno-nationalist identity-claims throughout the Euro-Mediterranean world; or the invention of a "new way of relating to 'value', to the 'absolute', to 'truth'" (ibid, 53). If the occidental 'view of the world' is being surpassed in an era of 'globalisation' because the 'West' is no longer the pole of power, then this presents a crisis of 'sense' – a question of what will be the 'sense of the world'. But as we will see, the crisis of sense is itself a result of the 'becoming worldwide' of a *particular* view of the world. The 'becoming worldwide' of authority, in the terms I expressed it earlier, manifests the 'infinite-finitude' of sovereignty. I will now explain this further.

What is crucial to understanding how authority or sovereignty is becoming 'worldwide' is the relation between 'sense' (as source of value) and 'world'. The

source of 'sense' is situated in a trajectory, a history, that Nancy calls the history of the 'West'. The West's sources of 'sense' in humanity, 'nation', 'people', and reason have become exhausted partly because of their 'becoming worldwide' – that is, the “West can no longer call itself the West from the moment it witnesses the spread, across the entire world, of the form that could once have seemed to constitute its distinguishing feature” (Nancy, 2003c, 37). The West is no longer the 'centre of civilization', reason, humanity etc. Nancy is describing the *becoming infinite of finitude* - the dissipation and dispersal of sovereignty, particularity, identity, and 'nation'. Does this conform to the claim that 'empire' is the juridical category that accurately reflects the new 'sense of the world'? In order to address this question, I will dwell a little longer on what Nancy means by 'world'. This is quite central to distinguishing Nancy's claim about 'worldwide' authority from Hardt and Negri's account of 'Empire'.

Nancy opens his characterisation of 'world' with a deconstruction of the Christian source of 'sense' as 'beyond this world'. Such an account of sense is to be found in a transcendent source of authority such as the Christian God (Nancy, 1997, 54-5). The thought of a 'world' beyond the binary of 'inside/outside the world' begins with Spinoza for whom God has an equivalence with Nature – the 'outside is on the inside' or at least is expressed as immanent to the world (see the discussion of Spinoza in these terms of inside/outside, *ibid*, 54). The main thrust of this approach is to get rid of a notion of authority as having a transcendent source.¹⁵⁸ With this

¹⁵⁸ Spinoza opens a thinking of God, and thus of authority and power, as capable of having an immanent cause. For Spinoza, as with Descartes, God was a 'cause of itself'. The paradox of this concept of 'cause' is that the thing would have to 'exist before it exists' (Spinoza, 2000, Introduction, 27-9, Part I, propositions 11 and 16). But Spinoza meets this with the explanation that 'cause must also be regarded as reason – “cause or reason” (*ibid*). The explanation of how God might be a 'cause of itself' is one of 'logical relationship' – it is not that “God first exists and then brings about his own

possibility of an immanent cause of the world the centrality of a “beyond of the world” is dissipated (ibid, 55). The source of sense “opens itself up *within* the world” (ibid, original emphasis). Sense is then what might be called the ‘transcendence’ of the ‘immanence’ of the world – or better still, what Nancy terms “*transimmanence*”, or more simply, the world’s existence and exposition (ibid).

The notion of ‘transimmanence’ is Nancy’s expression of the source of the ‘sense’ of the ‘world’.¹⁵⁹ The ‘world’ for Nancy is much more than simply a relation between ‘humans’ and what is beyond them (‘outside’ or ‘beside’ humanity). It is precisely the impossibility of an absolute ‘beyond’ that Nancy’s preoccupation with ‘finitude’ reveals (finitude as an infinite proliferation of singularities being exposed).¹⁶⁰ Consistent with all aspects of his thought, Nancy’s preoccupation is with thinking the ‘being-*with*’ of existence. Being-in-the-world, existence (*Dasein*), is the “spatial totality of the sense of existence, a totality that is itself existent ...” (ibid, 56). The ‘sense of the world’ is the ‘world’ as the place of existence. ‘Transimmanence’ expresses the sense of this world in a manner that shatters the regular “confines” by which the ‘world’ was previously given expression (ibid, “Space: Confines”, 37-41, at 40). For instance, ‘transcendence’ or ‘immanent’ sources of authority were reputed to disclose the sense of the world by placing the source of sense *either* ‘inside or outside’ the world (ibid). Borders and limits thus expressed the finitude of being

existence; it is to say that God’s existence follows logically from the concept of God” (ibid). Hardt and Negri also rely on Spinoza’s concept of cause when explaining the immanent cause of the ‘multitude’ of Empire. I will consider this below.

¹⁵⁹ Nancy explicitly seeks to depart from Heidegger’s concept of *Dasein* (the German noun for existence). It is beyond the scope of my enquiry to elaborate Heidegger at length here. I merely wish to point out the intellectual antecedents to Nancy’s sense of ‘being in the world’. Through the notion of ‘transimmanence’ Nancy calls into question Heidegger’s expression of the relation between ‘humanity’ and the ‘world’ as a relation between subject and object (Nancy, 1997, 55-6). For Nancy the human being should not be regarded as the centre or ‘end’ of nature. This is implied in Heidegger’s articulation of ‘humanity’ as “world forming” in contrast to the ‘stone’ which is “without world” and the animal which is “poor of world” (ibid).

¹⁶⁰ Recall the discussion of ‘Of Being Singular Plural’ (Nancy, 2000b) in *Chapter One*.

(ibid, 40). But as we observed in *Chapter One*, the limit of finitude is an 'infinite' exposure, a sharing which takes place across the 'limits'. The 'world', as with the finitude of being, is a spacing. The 'space' of the world involves 'limits'. But limits are always also the *surpassing* of limits (ibid). Put simply, the 'world', for Nancy, is the trace of ever transgressed limits.¹⁶¹ Let me articulate this relatively abstract discussion of 'world' more explicitly in terms of sovereignty.

4.1.2 Sovereignty and the 'Sense of the World'

The concept of sovereignty which conforms to the 'becoming worldwide' of 'authority' (the becoming infinite of finite spacing) is "sovereignty without sovereignty" (Nancy, 2000c, 134, 136-140). In *Chapter One* I made the point, through Nancy and Lefort, that sovereignty cannot be a discrete, monistic entity. In Lefort's terms, the 'nonsovereign' place or the 'empty place of power' results from the lack of a positive determination of society (the 'common', sovereignty and so on).¹⁶² Sovereignty, society or community cannot be given a positive determination from 'outside' or 'inside', from a transcendent or immanent source of determination.¹⁶³ To recall the character of 'sovereignty without sovereignty' discussed in *Chapter One* - it should have nothing to 'attain, achieve, accomplish, or finish' (Nancy, 2000c, 139; *Chapter One*, 37-8). It is precisely such an accomplished, 'finished' sovereignty that Hardt and Negri proclaim through their infinite notion of sovereignty as 'Empire'. It is their version of sovereignty as *'finite-made-infinite'*

¹⁶¹ Nancy's attempt to 'retreat' the 'sense of the world' is an attempt to 're-trace' the forms and grounds by which 'world' has been understood: see Nancy, (2003c, 306).

¹⁶² See the discussion of Nancy and Lefort in *Chapter One*, 37-8, 40-3.

¹⁶³ This is the 'end of sovereignty' that Nancy identified in 1991 in his discussion of sovereignty in relation to the Gulf War (Nancy, 2000c).

that I will shortly go on to critique. But first let us look at how Nancy elaborates sovereignty as 'worldwide' authority.

The 'spacing' of the world at the end of sovereignty can only be explained, according to Nancy, through what he terms "ecotechnics" (ibid, 133, 135). Though what is termed the 'global order' has no 'supranational' figure, reason, or end that can be identified, it has the "effectiveness" of "planetary technology" and "world economy": "If the world is a world today, then it is primarily a world according to this double sign. Let us call this *ecotechnics*" (ibid, 133 (original emphasis)).¹⁶⁴ The United States is the nation-state that Nancy identifies as the symbol of "triumphant ecotechnics" (ibid).¹⁶⁵ The figure of the "sovereign State" persists in a world of ecotechnics (ibid). 'War' as police action symbolizes the demise of the sovereign state to the extent that wars are no longer conducted to protect, affirm or expand 'nation-state' boundaries but to protect the multiple "presence" or interests of states which span the world (ibid, 129). The difference between the world as a collection of delimited sovereign states and the 'world' of ecotechnics is this: the 'world' must be conceived as a 'spacing', not dominated by sovereign 'finishing' (ibid, 140). This is the key distinction between the era of 'sovereignty without sovereignty' and the previous era marked by sovereign 'brilliance': it is the difference between a 'world' which manifests the "intersection of singularities" (multiple 'presences' of sovereignty), and one where the source and instrument that determines 'ends' of

¹⁶⁴ I will not recount the entirety of the convincing account that Nancy gives of 'ecotechnics', but see Nancy, 2000c, 129-141 for the fullest account in Nancy's writings. An account of 'technology' quite central to Nancy's notion of 'ecotechnics' can be found in: Nancy, 1997, 41.

¹⁶⁵ The reference to the United States is not explicit, but intimated through a reference to a sovereign State based on the 'arche-law' of its foundation and its current hegemony. The United States must be the nation-state Nancy is referring to given its the only current hegemonic state that can be counterposed to the now surpassed revolutionary project of the Soviet Union to which Nancy refers in the following sentence.

individuals, nations and ‘masses’ is a sovereign excess.¹⁶⁶ The latter, sovereignty as excess, a ‘brilliance’ that is made ‘present’ by exceeding the limits of finite ‘territory’ or the ‘normal situation’ is, according to Nancy, in decline. This is why it is necessary to think more rigorously how sovereignty is in the ‘world’. The multiple presences of sovereignty, the *infinite-finitude* of sovereign presences, is the mode that Nancy suggests for adequately thinking sovereignty in this ‘world’.

The term ‘world’ indicates a “gathering or being-together that arises from an *art* – a *technē*” (Nancy, 1997, 41, original emphasis). ‘Technē’ indicates that the ‘world’ is always a ‘creation’ (ibid). The world has no principle, end or material other than itself (ibid). Nancy is explicit that as ‘technē’, ecotechnics is yet to be liberated from technology, economy and sovereignty (Nancy, 2000c, 140). What would this liberation entail? It would, in brief, entail “sovereignty as nothing” (ibid, 141). ‘Sovereignty as nothing’ involves jettisoning modern symbolizations of sovereignty in “people” – the demand of a “sovereign distinction” for everyone (ibid).¹⁶⁷ The ‘nothing of sovereignty’ would involve law without foundation – thinking and acting without a model. Nancy acknowledges that all of this is not easily conceived:

It is not for us, nor for our thinking, modeled as it is on the sovereign model; it is not for our warlike thinking. But this is certain: there is nothing on the horizon except for an unheard-of, inconceivable task – or war. All thinking

¹⁶⁶ Compare the discussion in Nancy, 2000c, 108, the account of the persistence of ‘sovereign brilliance’, with the examination of ‘technology’ at 140-141 where Nancy presents the argument of a future where sovereignty is ‘Nothing’.

¹⁶⁷ It is precisely such sovereign distinctions that we observed being invoked in the *habeas corpus* cases which considered whether U.S Courts’ jurisdiction extended to Guantanamo Bay. Jurisdiction, in the Federal Courts’ decisions was tied to membership in ‘political community’ or, as with the Supreme Court decisions, to the presence of a subject (the Custodian of the detainees) within the delimited territory of a Federal District Court. It is precisely this delimitation of law that Nancy seeks to overcome.

that still wants to conceive of an “order”, a “world”, a “communication”, a “peace” is absolutely naïve – when it is not simply hypocritical. ... But everyone can clearly see that it is time: the disaster of sovereignty is sufficiently spread out, and sufficiently common, to steal everyone’s innocence. (ibid, 141-2)

To open a thinking of what it would mean for sovereignty to be ‘nothing’ manifests the outer limits of thinking on sovereignty, world, and globalisation. In Nancy’s thought on the ‘sense of the world’ there is clearly a call to think beyond the model of sovereignty – and indeed beyond the authority of law that is modeled on the finitude of such sovereignties. In the latter part of this Chapter I will return to consider how Nancy’s call for sovereignty as ‘Nothing’ impacts on efforts to imagine and implement a ‘postcolonial’ juridical order.

The possibility of a ‘postcolonial’, ‘post-imperialist’ political subject and juridical order beyond the model of modern sovereignty (territorially delimited by the nation-state and its ‘people’) has been heralded by several millennial texts. None has been more widely discussed than Hardt and Negri’s *Empire* (2000) which I will shortly consider. The arguments in *Empire* and in Negri’s previous writings appear to take up several of the themes that Nancy has raised. If there is to be a thinking of ‘sovereignty without sovereignty’, and a law that is not premised on the model of a transcendent mode of sovereignty, then ‘Empire’, which is supposed to supercede the sovereignty of the ‘nation-state’ is a useful place to start.

I should stress again that the comparison of Nancy’s call for ‘sovereignty without sovereignty’ (sovereignty as ‘Nothing’), and Hardt and Negri’s ‘Empire’, is

not a comparison of like with like. There is a significant difference between a world ‘without sovereignty’ called for by Nancy, and the persistence of a “single power that overdetermines” all power, which structures previous imperial competitions in a “unitary way”, and treats them all as “one common notion of right” – the “new sovereignty” heralded by Hardt and Negri (2000, 9). This new sovereignty is a “supranational world power”, an imperial notion of right, which is the “framework” for “totalizing social processes of Empire” (ibid, 10). Rather than sovereignty as ‘Nothing’, Hardt and Negri’s conception of ‘Empire’ characterises a world which is encompassed by an all-pervasive sovereign totalisation. Thus it is apt to express Hardt and Negri’s conception of sovereignty as the *‘finite-made-infinite’*. We will see when we discuss the detail of their argument that ‘Empire’ is aptly described as the ‘finite-made-infinite’ because they assert the end of ‘limits’, enclosing frontiers or delimited juridical orders. This is distinct from the always singular-plural, *infinite-finitude* of sovereignty described by Nancy. Hardt and Negri’s conception of sovereignty, I want to argue, will not sustain an emancipatory, ‘postcolonial’ or post-imperialist enterprise. Even though Hardt and Negri claim that ‘Empire’ is co-present with a social subject called the ‘multitude’ – a global ‘collective’ which has the capacity to launch a ‘counter-Empire’ - this formulation of ‘post-sovereign’ social agency fails to address the persistence of a delimited, fragmented ‘global order’.¹⁶⁸ There is much that stands in the way of imagining a ‘post-sovereign’, post-imperial world. I will return below to consider the implications of sovereignty as ‘Nothing’. But first let us continue to figure how sovereignty may be becoming ‘worldwide’. This task is aided by a sustained consideration of Hardt and Negri’s assertion that ‘Empire’ is the juridical form of global sovereignty.

¹⁶⁸ As Derrida has pointed out, one cannot combat “head on” all sovereignty without at the same time threatening freedom and self-determination (Derrida, 2003b, 49). I will return to Derrida’s argument below.

4.2 Enumerations of Empire

According to Hardt and Negri the decline of 'national constitutional systems' is replaced by a 'global' juridical category called 'Empire' with the U.S as a superpower at the pinnacle of the "pyramid" of a mixed constitution (ibid, 309). While the nation-state is not entirely extinct as a form of political power, it is only one among an emerging triumvirate of "unified global command" which includes the G7 countries (now G8), the United Nations General Assembly, and NGOs (ibid, 309-314). They claim that the new imperialism of Empire is different to the colonialisms of old (ibid, 180, 199-200). While colonial expansion and rule deployed fixed ideological categories of difference, such as 'race', as the basis of exclusion, domination and destruction, the new imperialism manages and modulates difference in a "universal republic" which has a "boundless and inclusive architecture" (ibid, 166). This new sovereignty of 'Empire' as a 'boundless' juridical form is only conceptually sustainable if the 'limits' which demarcate the international system of sovereign states is surpassed. The spatial terrain of 'Empire' would have to be 'open' and boundless. Moreover, 'Empire' as 'worldwide' sovereignty grossly underestimates the continuing significance of the nation-state as a juridical and political form. I will begin by giving a brief overview of the concept of 'Empire' and then consider whether 'Empire' reflects a model of 'worldwide authority'. The critique I level at 'Empire' will be focused on how Hardt and Negri fail to sustain what they claim is its 'postcolonial' and 'postimperial' character. I will conclude my treatment of the concept of 'Empire' by arguing that the nation-state continues to be the principal and pervasive mode of sovereign authority, and that it is my account of

the 'infinite finitude' of sovereignty that accurately discloses the character of imperial sovereignty.

'Empire' is more than a characterisation of a new imperial mode of sovereignty. It also invokes a new mode of 'political community' expressed through the notion of the 'multitude'. The social body governed by Empire is no longer the 'people', 'masses' or 'working class' (Hardt and Negri, 2004, xiv). It is the 'multitude' which is simultaneously a constituent element of Empire and the agent that resists its domination.¹⁶⁹ 'Empire' embodies various constituent subjectivities, represented through the virtual figure of the 'multitude' which constitutes a "mixed constitution" (see Hardt and Negri, 2000, 309-314; and Hardt and Negri, 2004, 219-227, 331-340). The multitude, as Hardt and Negri would have it, are "capable of autonomously constructing a counter-Empire, an alternative political organisation of global flows and exchanges"; "the multitude will have to invent new democratic forms and a new constituent power that will one day take us through and beyond Empire" (Hardt and Negri, 2000, xv). There are then, at once, two aspects within and of Empire.

First, Empire is the juridical embodiment of sovereignty. It is the 'form' which 'transcends' and 'represents' its multiple constituent parts. This, to put it

¹⁶⁹ The 'multitude' is a notion that Negri has developed by drawing on Spinoza's thought. The 'multitude' (*multitudo*) is the 'living reality' that is "contained within determined limits" (Negri, *The Savage Anomaly*, 187). The multitude is constitutive of these limits and always also exceeds them. This is manifested in the opposition between power (*potentia*) and Power (*potestas*):

potentia and *potestas*, power against Power. *Potentia* as the dynamic and constitutive inherence of the single in the multiplicity, of mind in the body, of freedom in necessity – power against Power – where *potestas* is presented as the subordination of the multiplicity, of the mind, of freedom, and of *potentia*. (ibid, 190-91)

The conundrum raised by the notion of the 'multitude', one that is beyond the scope of my analysis to resolve, is how a 'multitude' which is 'yet to come' or only emerging can constitute an Empire which is already a form of sovereign power that governs the world.

crudely, is the 'undesirable' part of 'Empire' which must be overcome. Second, Empire also embodies the constituent power of the 'multitude'. Empire is thus an 'immanent' expression of the power of the 'multitude':

The plane of immanence is the one on which the powers of singularity are realised and the one on which the truth of the new humanity is determined historically, technically, and politically. For this very fact, because there cannot be any external mediation, the singular is presented as the multitude. (Hardt and Negri, 2000, 73)

The 'multitude' is a collection of singularities whose 'desire' is thwarted when it is mediated by a form of power as sovereignty (as Empire). But this unmediated immanent power of the multitude must be expressed, be re-presented, if it is to take some political form other than 'Empire'. Hardt and Negri do not offer an alternative expression of the multitude's immanent power.¹⁷⁰ As Rasch points out, the multitude (immanent power) appeal to Empire (transcendent power) when the multitude claim 'rights' of global citizenship, a 'social wage', freedom of movement, and reappropriation of the fruits of production (Hardt and Negri, 2000, 400, 403, 405-6; Rasch, 2004, 115). There are then several conceptual and political difficulties with imagining the 'multitude' as at once constitutive of Empire, against a sovereign 'form' which transcends its immanent power, and nonetheless making claims that can only be expressed or guaranteed by a transcendent sovereign entity.

In their recent book, *Multitude: War and Democracy in the Age of Empire* (2004), Hardt and Negri attempt to address the criticisms levelled at *Empire*, and more specifically the criticisms that the 'multitude' is a concept that cannot be given

¹⁷⁰ See Rasch, 2004, 113-116, for a critique of the opposition of 'transcendent' and 'immanent' forms of sovereignty in Hardt and Negri's *Empire*.

any sustained content. They retort by explaining that the ‘multitude’ can be conceived in two different (temporal) ways – the first ‘ontological’ and the second ‘historical’ (Hardt and Negri, 2004, 221). The ‘multitude’ is thus “always-already and not yet” (ibid, 222) – a rejoinder that seems to repeat the problem rather than address it. The multitude at once manifests the ontology of ‘Empire’ and is also a historical notion of the global ‘common’ which is still emerging. The ‘ontological’ notion of multitude is informed by Spinoza’s conception of freedom, derived from reason and passion, which is absolute. This absolute expression of freedom is the human propensity to refuse authority – a “faculty of freedom” which has driven innumerable revolts and revolutions (ibid). The ‘multitude’ which is ‘not yet’, already exists as a “real potential” (ibid, 222). This ‘multitude’ needs a ‘political project’ to bring it into being (ibid, 221). In this formulation of the multitude as ‘historical’ it is possible to see the distinction between power as *potentia* and *potestas* referred to above. The relationship between the multitude (*potentia*) and Empire (*potestas*) is such that the former both constitutes and seeks to overcome the latter. For Hardt and Negri, the multitude is thus both ontological, always already a singularity that seeks freedom and refuses authority, and historical, a teleological project that is yet to be realised.

What I have just set out are the basic tenets of Hardt and Negri’s thesis on ‘Empire’ and the ‘multitude’. As my task in this Chapter is to examine the character of imperial sovereignty, I will confine the rest of the engagement with Hardt and Negri’s account of ‘Empire’ to the question of whether sovereignty has indeed become ‘worldwide’. That is, I will address whether sovereignty has surpassed its (ever uncertain) ‘ground’ in the nation-state. Moreover, I will continue to compare

Nancy's account of authority becoming 'worldwide' with the assertion that 'Empire' marks the end of the nation-state. This discussion, as I highlighted earlier, is a precursor to considering how sovereignty can indeed be 'Nothing', and what it would mean for the place of power to be 'empty'.

4.2.1 'Empire' as 'Worldwide' Authority?

Nancy has explicitly considered whether sovereignty is currently in transition to 'empire'.¹⁷¹ Here I will consider Nancy's treatment of 'empire' and distinguish it from Hardt and Negri's claims. In "Of Being Singular Plural", Nancy cites Antonio Negri with approval (Nancy, 2000b, 36, n. 42). With Negri, Nancy identifies the "present transformation in "political space" as a transition toward "empire" (ibid, 36). The notion of 'empire' signifies two things for Nancy:

- (1) domination without sovereignty (without the elaboration of such a concept); and (2) the distancing, spacing, and plurality opposed to the concentration of interiority required by political sovereignty. (ibid)

Nancy's focus on 'political spacing' as the approach to 'empire' is crucial. It is consistent with his conceptualisation of 'political space' as the place where being is exposed - where existence discloses its ontology as the singular plural spacing of beings.¹⁷² His concern has been to 'retreat' the political as a 'spacing', relation, sharing and exposure that reveals the 'singular plural' of being, the 'being-with', as the ontology of existence.¹⁷³ He has elaborated this thought of Being in relation to the

¹⁷¹ The upper-case 'Empire' will only be used when referring to Hardt and Negri's concept of sovereignty developed in *Empire* (2000).

¹⁷² Recall here the extensive discussion of Nancy in *Chapter One* – and consider particularly Nancy, 1991, 2000b, 2000c.

¹⁷³ This was elaborated in *Chapter One* as Nancy's call for a 'non-sovereign' spacing of the world where the archaism of sovereignty is jettisoned. What this involves, at the very least, is an end to the

concept of 'world', and done so in a manner cognisant of sovereignty and 'empire'. When Nancy claims that 'empire' involves 'domination without sovereignty' (in the passage quoted above) he is asserting the end of elaborations of sovereignty through the essences of 'nation', 'people', property, humanity, or community, where each of these is treated as a substance which symbolises or gives content to sovereignty. Sovereignty is becoming exhausted because it is no longer convincing to assert that it is a 'totalisation' that has a secure substance.

Nancy is asserting a 'transition' to 'empire' and not 'empire' as an accomplishment. However, is it possible to claim that the dominations of 'empire' are indeed without sovereignty? Has empire emerged as a 'global' spacing in the sense Nancy intended in his second attribute of 'empire' - the relation of plural singularities with no concentrated, discrete interiority? Empire still entails rule by multiple sovereign entities - 'market states' (Bobbitt, 2002) and particular 'nations' which, though positioned 'within' a particular territory, extend their rule beyond the 'limit' of a particular nation-state. The carrier of this configuration of nation, as Fitzpatrick has argued, is imperialism (Fitzpatrick, 2001, 146).¹⁷⁴ As we will see, Nancy also accepts that this 'spacing' of sovereignties is not surpassed. He insists that authority based on a notion of sovereignty which has some discrete 'political interiority' cannot be sustained (see quote above – Nancy, 2000b, 36. n. 42). The end

conceptualisation of political space as an 'attainment, accomplishment, achievement or finishing' (Nancy, 2000c, 139). I will not repeat the exposition of Nancy here.

My discussion of Nancy in this Chapter should be read as an engagement with the nature of imperialism and empire as the primary focus. I will relate Nancy's arguments to the extent that they relate to the nature of sovereignty in what is apparently a new epoch of imperialism and empire. Though I see Nancy's arguments as particularly helpful for framing the question of sovereignty in empire, I should not be read as accepting them without question. I will raise my concerns with Nancy's formulations below.

¹⁷⁴ I will elaborate this argument through Fitzpatrick (2001) and Bobbitt (2002), below.

of sovereignty and the emergence of 'empire' are to be observed through the sources of 'sense' or authority which are now 'worldwide'.

The 'spacing of empire' is a problem which Nancy poses in light of the impossibility of delineating a source of 'sense' (authority) which is either clearly inside or outside a particular 'political space' (Nancy, 1997, 5-6). For instance, 'Occidental culture' has for many centuries distinguished its source of 'sense', 'logos', from those 'others' who configure their 'sense of the world' through 'myth' (ibid, 6). But Nancy argues that it is no longer possible to claim that the "we" of Occidental culture can access a 'world' (a spacing) which has been designated the "world of myth" (ibid). Nor is it possible to say what is anterior or exterior to the Occident (ibid). The 'presence', the finitude of "being-in, being-for, being-by" (the various categories which delimit being-in-common through an essence) needs to be subverted by a thinking of 'world' as "*being toward*" (ibid, 8, original emphasis).

Does Nancy's thinking on 'empire' show the way to overcoming a world of 'political spacing' delimited by fragmented sovereignties and dominant Sovereigns in the form of the nation-state? As Fitzpatrick has argued, it is too simplistic to claim that 'nation' is always and only the 'nation of blood and soil' (Fitzpatrick, 2001, 146). It cannot only 'be' this – for 'nation' is also "oriented towards the universal" (ibid). But this "extraversion" of nation cannot be "unless it is particularly instantiated" (ibid). The extension beyond must come from a particular place. A singular sovereignty and its law is embodied in 'nation' – but can only exist 'in-between' its particular and universal registers (ibid). Imperialism is the 'carrier of this configuration' (ibid). It is through imperialism that (occidental) sovereignty and law

can be both particular and universal. As we will see, this configuration of law (and sovereignty) as 'in-between' a particular nation and its 'outside' – occupying the place of a now familiar 'limit' which contains what is within but also opens to its outside – is refuted by Hardt and Negri's when they assert the emergence of 'Empire'. For Hardt and Negri, it is precisely the particularity of an imperialism grounded in a bounded place which has been surpassed by Empire. I will insist, along with Fitzpatrick, that an 'open frontier', rule without limits, is an impossibility.

To summarise, then, the significant difference between Nancy, and Hardt and Negri in relation to the emergence of 'empire/Empire' is that Nancy seeks a 'spacing' of the 'world' which is not determined by this or that 'essence' of sovereignty as 'people', property, 'nation', the 'human' of human rights and so on. Hardt and Negri assert the disillusion of limits. For them the 'open frontier' of 'Empire' (which I will consider in more detail shortly) is devoid of what a 'frontier' would ordinarily exist to maintain: some state or condition which is contained within. Nancy more rigorously thinks the question of the 'limit'. For him a juridical order and community must be considered through a 'limit' (of sovereign power for instance) which cannot be sustained as a delimited, finite entity because the limit is always an 'exposure' across and beyond the limit.¹⁷⁵ That is not to say that the 'limit' can be simply done away with. The existence of a plurality of beings and the sovereignties which symbolise their community, occupy the space of a limit. The 'world' is a spacing of ever-transgressed limits. The 'trace' of this transgression of limits is what reveals the singular-plural 'world', as I stressed above through Nancy (section 4.1.1, above).

Finitude persists in and through the *infinite* exposure and sharing which takes place at

¹⁷⁵ This configuration of a 'nation' and its law contained within a 'limit' but ever open to its beyond, a configuration in-between particular and universal carried through imperialism, has been characterised by Fitzpatrick and discussed above.

the transgression of limits. Existence is *infinite-finitude*.¹⁷⁶ This thinking reveals the character of 'worldwide' authority where 'sovereignty is without sovereignty' – without the essences which apparently guaranteed the discreet delimitation of monistic conceptions of sovereignty. We observe the emergence of this 'sovereignty without sovereignty' in Nancy's discussion of globalisation. The proliferation of 'ecotechnics', Nancy's mode of giving content to *mondialisation* (globalisation), requires the existence of a sovereign state. The sovereign nation-state is a particular singularity which is made present in and through the transgression of its limits.

By now we should be clear about the difference between the two approaches to the sovereignty of 'empire/Empire' - of Nancy on the one hand and Hardt and Negri on the other. The former seeks the 'end of sovereignty' but is cognisant of the persistence of sovereign limits (the *infinite-finitude* of sovereignty). The latter assert an overarching sovereignty that is *without* limits (sovereignty as the *finite-made-infinite*). Which of these thinkers equips us with the better approach to imagine a 'postcolonial' or 'postimperial' sovereignty? Will sovereignty simply dissipate with the 'becoming worldwide' of authority? Can sovereignty as 'nothing' sustain a 'postcolonial' and anti-imperial political and juridical order? I will approach these questions by first arguing that Hardt and Negri's assertion that the 'global sovereignty' of 'Empire' is both 'postcolonial' and 'postimperialist' cannot be sustained. I will then consider whether an emancipatory, 'postcolonial', anti-imperial politics can be sustained or facilitated by Nancy's call for an 'end of sovereignty'.

¹⁷⁶ The phrase 'infinite-finitude' captures the 'relation' and 'exposure' across limits of being(s). This was developed in *Chapter One* through Nancy's notion of 'being singular plural'.

4.2.2 *'Empire' as 'Postcolonial' and 'Post-imperialist'?*

A central claim made by Hardt and Negri is that Empire is “postcolonial and postimperialist” (9). My focus here is on undermining their assertion that an imperialist notion of Empire manifests a new form of sovereignty which has surpassed the limit of the ‘nation-state’. How does their conceptualisation of the American colonial frontier as a “utopia of open spaces” (167, 169) condition and ultimately damage their claim that the new juridical category of ‘Empire’ has no outside or is without limits? For Hardt and Negri Empire is ‘postimperialist’ in the sense that it manifests the end of spatially delimited juridical limits and the projection of authority from a particular ‘place’ as was the case with colonialism and imperialism. As my enquiry has focussed consistently on the question of ‘limits’, on the finitude of sovereignty, the apparent emergence of a ‘postcolonial’ and ‘postimperial’ juridical concept of sovereignty ‘without limits’ must be interrogated. The possibility of a ‘postcolonial’, ‘postimperial’ sovereignty and juridical order was the point of departure of this enquiry. An engagement with Hardt and Negri’s claim that ‘imperialism’ has been surpassed by ‘imperial sovereignty’, a distinction I shall shortly elaborate, will return us to the question of the im-possibility of ‘postcolonial sovereignty’.

At the heart of the foundation of the American Republic, the open society which Hardt and Negri claim is becoming worldwide, was the genocidal exclusion of native peoples. This is the foundational exclusion that Hardt and Negri underplay in their conception of the frontier as an “open space of democracy” (170). This foundational ‘division’, the usurpation of native peoples’ land and their genocidal exclusion from the ‘new republic’, I will argue, is the exclusion (the delimitation) that

in-forms an 'Empire' founded on the American Republic. The colonial frontier and the new fronts of imperial expansion undermine the claim that the new imperial sovereignty of Empire has no 'outside'. Though Hardt and Negri acknowledge that the "open terrain was limited" (172), that "power ran up against its spatial limits" (173), they insist on an alternative history of the republic which becomes the history of 'Empire' as a sovereign formation that is "imperial and not imperialist" (182). The key feature of the 'imperial and not imperialist' sovereign formation is that "in contrast to imperialism's project to always spread its power linearly in closed spaces and invade, destroy, and subsume subject countries within its sovereignty" the U.S constitutional project rearticulates an open space "reinventing incessantly diverse and singular relations in networks across an unbounded terrain" (ibid).

According to Hardt and Negri, Empire is "altogether different from 'imperialism'" (xii). They assert the "end of colonialism" and the "declining powers of the nation" as indicative of the passage from the paradigm of modern sovereignty to the paradigm of "imperial sovereignty" (137). While 'old' forms of imperialisms were extensions of the sovereignty of the "European nation-states beyond their boundaries", Empire is "imperial" but not "imperialist" (xii, xiv). The character of being 'imperial' but not 'imperialist' is explained by invoking the United States Constitution, not only the formal Constitution reflected in the written document, but the "material constitution" - that is, "the continuous formation and re-formation of the composition of social forces" (xiv). Such a widely defined "material constitution" immediately sounds like a rather amorphous and ungraspable reference to 'everything there is'. Empire is something 'new', distinct from 'old imperialisms, and a 'rule without limits' which encompasses a "spatial totality" (xiv). It is an order that

“suspends history” and fixes the existing state for “eternity” (ibid). From the perspective of Empire, it emerges at the “end of history” or is a regime with “no temporal boundaries” (xiv-xv).

Hardt and Negri set their thesis against ‘postcolonial’ accounts which, on their assertion, still labour with an unsound account of the dialectical relation between an imperial Occidental sovereign and its others (114-115). Postcolonial theorists fail to grasp this new imperialist sovereignty because they are “combating the remnants of past forms of domination” (138, 146).¹⁷⁷ Modes of being which are disclosed by ‘postcolonial’ and ‘postmodern’ theorists through notions such as ‘hybridity’ and ‘ambivalence’ point towards ‘Empire’ (138-139). The affirmation of fragmented social identities and the deconstruction of binary oppositions have the potential to defy totalising forms of sovereign power (139). However, these theorists are apparently blind to the paradigmatic changes in sovereignty that their observations trace (139). The main flaw which Hardt and Negri attribute to ‘postcolonial’ and ‘postmodern’ theorists is that they are wedded to overcoming the dialectical processes of identity formation by deconstructing the binary oppositions which are hierarchically arranged (139-146). As the ‘world market’ is apparently ‘anti-essential’ and ‘anti-foundational’ – it must be seen as overwhelming binary division and promoting “infinite multiplicity” (150). In other words, ‘postcolonial’ and ‘postmodern’ theorists are tackling an enemy, both epistemological and political, which no longer exists (137).

¹⁷⁷ This is a blatant misreading of the multiple meanings of the term ‘postcolonial’ and the body of work it invokes – see Ashcroft (2001, 7-13) for a corrective.

The contribution of 'postcolonial' theorists to conceiving modes of resisting imperial domination is far more significant than the influence which Hardt and Negri grant them. By identifying the 'ambivalence' which 'unsettles' the assertions of sovereignty over the colonial territories of European colonial powers, for instance, 'postcolonial' and 'postmodern' theorists are doing either or both of the following: indicating that the identity of a 'people' or 'nation' has no secure presence or substance, and thus no firm hierarchy between coloniser and colonised. The 'title' of the coloniser's sovereignty over territory is deconstructed to reveal the 'trace' of founding exclusions which undermine the legitimacy and thus authority of the coloniser's sovereign right to territory.¹⁷⁸ Secondly, 'postcolonial' and 'postmodern' theorists are not merely opposing the binary opposite of a colonised 'margin' to its colonial centre. As Fitzpatrick has pointed out, what 'postcolonial' theory offers is an insight into what is resistant within the colonial:

The very force of the postcolonial comes from its integral yet resistant relation to the colonial, and from its thence revealing what is constitutively of, and yet denied by, that selfsame colonial condition. This is not the revelation of some marginal matter but, rather, the disclosure of the very structuring ... of the colonial. (Fitzpatrick, 2004b, 3)

Postcolonial theory points to an ambivalence within colonial assertions and gestures, such as the usurpation of indigenous peoples' territories and the establishment of a law that must later perfect an always imperfectable sovereign event.¹⁷⁹ Pointing to what resists within the coloniser's assertions unsettles the footing on which the colonial enterprise is grounded. A useful example to substantiate this point, in

¹⁷⁸ I would situate my approach to de-positioning the colonial sovereign event in Australia among these 'postcolonial' interventions. I will shortly provide yet another example by referring to Fitzpatrick's discussion of the assertion of colonial sovereignty over the territory that later became the United States.

¹⁷⁹ My treatment of *Mabo (No 2)* in *Chapters One and Two* extensively discussed such an instance.

addition to the Australian ‘postcolonial’ enterprise discussed extensively in the first two Chapters, can be found in the (not too) ‘open’ frontier of the United States from which Hardt and Negri draw so much inspiration.

As the U.S colonial frontier expanded, the Supreme Court of the U.S determined whether Indian Nations had the capacity to hold and alienate property, and whether the territory of the United States was acquired by ‘discovery’ or ‘conquest’.¹⁸⁰ In *Johnson v M’Intosh*, Marshall CJ recognised that native people had ‘natural rights’ in their land ((1823) at 563; see discussion in Fitzpatrick (2001a, 166-170). But then the native people had to be derided, rendered beyond the pail of civilisation in order to ensure that the rights and privileges which go with being proprietors, the capacity to possess title and alienate land, were denied them. As Fitzpatrick explains, there is a “double ambivalence” – the native people have natural rights to property but at the same time could not be included by recognition of their natural rights as they were savages who could not be assimilated (ibid, 168). This first ambivalence facilitates the denial of native peoples’ natural rights to property. But this denial haunts the ‘conquest’ that must be sustained in order to secure European sovereignty over the territory – the same sovereignty later inherited by the United States. This results in the second ambivalence - there can be no conquest if the conquered people cannot be assimilated, or governed as a distinct people (ibid). There must and cannot be a conquest to secure sovereignty over a territory. The assertion that ‘imperial sovereignty’ exercised in the American frontier is ‘open’, that

¹⁸⁰ Notable among these is the decision of Marshall CJ in *Johnson v M’Intosh* (1823). See also *Cherokee Nation v Georgia* (1831). A thorough discussion of these cases is to be found in Fitzpatrick (2001, 166-175).

My reference to the Indian cases is in no way intended to be an encapsulation of their many complexities. I refer to them here in order to refute Hardt and Negri’s assertion that the ‘ambivalence’ at the heart of imperial sovereignty which ‘postcolonial’ theorists have pointed to is superfluous for understanding empire.

it is evidence of a Republican principle without an 'outside', is undermined by the 'ambivalence' at the heart of imperial sovereignty which 'postcolonial' theorists like Fitzpatrick have identified.

The new dialectic which Hardt and Negri implicitly rely on, despite their Deleuze-inspired proclamation against such dialectical structures (which, remember, was the folly of 'postcolonial' theorists) is between a "principle of expansion" *and* 'limitation and control' (165-66). 'Empire' is the universalisation of the expansionist republic. It is the imperial expansion that has "nothing to do with imperialism" or with state organisms designed for "conquest, pillage, genocide, colonization, and slavery". (166-67). The genocide of Native Americans who were placed outside the Constitution is merely presented as an "internal contradiction" given African Americans were posed within it (170). Let's look more closely, then, at the in/finitude of 'imperial sovereignty' which in my view insistently conditions any outward expansion.

The 'new imperial sovereignty' which Hardt and Negri assert to be different from the 'European' form of modern sovereignty is "radically democratic", open and engaged in a "continuous process of expansion" (169). This "frontier of liberty", the "utopia of open spaces" (ibid) must contend, however, with the subordination of Native Americans in the process of its formation. The account of this subordination is too readily posed in those dialectical terms that Hardt and Negri reserved for misguided 'postcolonial' theorists. And so the Native Americans were of a "different order of human beings", "subhuman" and so treated like the flora and fauna (169-170). The "war" against the natural environment, its harsh winters, which had to be

withstood, was also the approach to combating the native inhabitants (ibid). The paradox presented by this 'utopia of open space' is that it was constitutively *closed* to Native Americans. Hardt and Negri concede that Native Americans:

had to be excluded from the terrain to open its spaces and make expansion possible. If they had been recognised there would have been no real frontier on the continent and no open spaces to fill. They existed outside the Constitution as its negative foundation. (170)

It is worth emphasising here that the 'frontier of liberty' and the 'utopia of open space' was not a condition to be achieved by perfecting the Constitution. The 'radical democratic' character of the 'new imperial sovereignty' is not a *telos* that was gradually achieved or remains to be accomplished. Hardt and Negri's point is that the structure (if such is still permitted) of imperial sovereignty was always already 'open', infinite, expansive, and without borders. The U.S Constitution is imperial and not imperialist because:

in contrast to imperialism's project always to spread its power linearly in closed spaces and invade, destroy, and subsume subject countries within its sovereignty ... the U.S constitutional project is constructed on the model of rearticulating an open space and reinventing incessantly diverse and singular relations in networks across an unbounded terrain. (182)

This is what gives rise to the paradox in their account. The foundation of 'Empire' is at once produced by the familiar dialectical negation of the native 'other', and at the same time based on a multiplicity of singular relations which form networks in an unbounded terrain. The 'frontier' is at once 'enclosed' against its constitutive other and always 'open'.

This new imperial sovereignty, then, like the sovereign variants observed in ‘postcolonial’ Australia and in the context of indefinite detention of persons held in Guantanamo Bay, is at once *finite* and *infinite*. Imperial sovereignty cannot ‘be’ without its foundational negation. Imperial sovereignty is not only constituted by divisions *within* the United States. The new imperial sovereignty which Hardt and Negri stressed was distinct from ‘old’ colonialisms – with their closed spaces, invasions, colonies etc – also featured in U.S colonialism in the Philippines. A thorough account of U.S colonialism is beyond the scope of this analysis. But as Fitzpatrick notes, when the U.S Supreme Court came to consider whether inhabitants of the U.S colonies in Hawaii, the Philippines, and Puerto Rico should be considered part of the United States, the colonised natives were, as usual, found to be “essentially different and as such in need of subordination and guidance” (Fitzpatrick, 2001, 176). These cases which are known as the *Insular Cases* recognised that Congress had powers over the colonial territories and that such powers were unrestrained by the Constitution (see discussion in Fitzpatrick, *ibid*). Far from manifesting a form of sovereignty which from the beginning was ‘open’ and without an ‘outside’ – the United States and its Constitution, when confronted with the people of the colonised territories, resolved through its Supreme Court that the laws of the Constitution would not extend to people of these races with their ‘different’ habits, laws and customs (*ibid*, 177). Although U.S sovereignty was formed through expansion, commencing with the brutal frontier where it encountered and suppressed its native peoples, this expansion was never ‘open’ and without borders. Infinite openness was always already finite.

Sovereign power is in constant movement across 'limits'. The infinite extension of sovereign power, such as in the subordination of native peoples and the laws applicable in the colonial territories of the United States, is an ambivalent expansion where the finitude of the imperial 'nation' and its law continues to be delimited and differentiated from the colonised people encountered in such expansion. This ambivalence results from the infinite-finitude of imperial sovereignty. This ambivalence and the form in which the im-possible 'limit' persists can be observed by considering the persistence of the nation-state as a political and juridical form.

4.3 Empire and the End of the Nation-State?

The 'nation-state' is the carrier of 'nationalism' – a nationalism that is expressed as a delimited sovereign entity. The persistence of a delimited sovereignty as the expression and symbolisation of a particular political community – a community that more specifically takes the form of the 'nation' - has been observed in several contexts discussed in preceding Chapters. 'Nation' is an evasive notion that signifies a "radical variety" of "purposes, histories, ideologies and sustaining myths" (Fitzpatrick, 2001a, 112-113). In spite of this variation in content, and perhaps because of it, 'nation' also has a "universalist thrust" (ibid, 113). In numerous contexts such decolonisation, in the articulation of 'postcolonial' renewal in colonial settler societies (such as Australia), and in the 'emerging' nation-states of the former Soviet Union, it is 'nation' that offers a medium for expressing 'self-determination'. The essences and unities by which the sovereignty of 'nation' is expressed, as a monistic sovereign or 'one law of the land' for instance, has been steadily undermined in much of this thesis. The focus here is on examining the persistence of the 'nation-

state' in a time of 'globalisation' and the emergence of 'Empire'. Understanding how and why the 'nation-state' persists as a 'particular' form of political and juridical structure will facilitate will a return to assessing the possibility of an 'end of sovereignty' proposed by Nancy.

What forms 'nation', "linking and mediating between its universal and particular dimensions" is "in various idioms a 'state of law'" (ibid, 111). In preceding Chapters, I have expressed the at once delimited and universally extraverted character of the sovereign nation-state. I have characterised this as the at once 'finite' and 'infinite' character attributed to sovereignty by law. As we observed in the attempt in Australia to correct the excesses of an 'old colonial' sovereign in order to create a 'postcolonial' nation, and in the context of the warring expansions of a neo-imperial United States, it is 'law' that serves to express both the delimitedness and illimitability of a sovereign that thus cannot be solely particular or universal. The finite and infinite character of sovereignty has been challenged by Hardt and Negri who assert that the 'new' imperial sovereignty is one without limits – 'Empire' is an 'open frontier' with no 'outside'. I have confronted this claim in the preceding discussion by pointing out the variety of ways in which the model for the 'new' sovereignty of 'Empire', the formal and material constitution of the United States, was from its colonial outset and imperial extraversions, constituted through the negation of the native peoples who occupied the territories that were subject to imperial rule. In this section I want to dispel the claim that the nation-state has been

superseded (see for example MacCormick (1999), Ch. 8; Hardt and Negri (2000); Bauman (2002)).¹⁸¹

A “boundless imagination” may give content to ‘nation’ as a universal that is impossible to limit (Fitzpatrick, 2001a, 119, see generally 114-120). An infinite number of ties may be presented as the basis for the coherence of ‘nation’. On the other hand, adherence to ‘human rights’ is “by now the pervasive criteria by which a nation’s proximity to the horizon of the universal may be gauged” (ibid, 120).¹⁸² Any other instantiation is liable to be held in check, now with the sanction of a ‘pre-emptive strike’, by the other universal that enables ‘nation’ – the ‘international community’ of nations (ibid, 121). Indeed, military interventions in Kosovo in 1996 and Iraq in 2003 were undertaken in the name of ‘human rights’ and ‘democracy’ by a ‘global’ policing power usurped from the ‘community of nations’ by a nation-state, the remaining Super Power and its allies (see Gregory 2004). The finitude or particular delimitation of governable entities that Hardt and Negri claim has been surpassed is more palpable, then, if we consider how the ‘nation-state’ persists in an era of ‘globalisation’. For this purpose I will consider two perspectives that insist on the continuity of the ‘nation-state’ – both cognisant of the tendencies which inform Hardt and Negri’s assertion that the ‘nation-state’ is superseded in ‘Empire’.

¹⁸¹ It is beyond the scope of my analysis to review the large literature on ‘nation’, ‘nationalism’, and the relation of these to the ‘state’: see for instance, Gellner (1983); Anderson (1991); Kymlicka (1989) and Kymlicka (1995). This literature proliferated particularly after the liberal democratic nation-state embraced ‘multiculturalism’. The traditional content given to the ‘nation’ was that of ‘people’ unified by their ‘race’ or ‘ethnicity’. The existence of a plurality of communities within a ‘nation’ was brought to light by the ‘new social movements’ in the 1960s and 1970s. These movements historicised notions of ‘race’ and ‘ethnicity’ and challenged the essentialisms that gave content to these concepts. This led to a reassessment of the character of a ‘nation’ and the role of the state in the face of the plurality of identities. Much of this literature has been discussed and critiqued by Fitzpatrick (2001a, Ch 4). I rely here on Fitzpatrick’s critical engagement with this literature, and will more explicitly draw on his insights in what follows.

¹⁸² The attachment of the universal to the particular, of universal human rights to a ‘nation-state’ which guarantees them, was emphasised with the force of a detailed historical account by Hannah Arendt (1958), Ch. 9. In the next section I will consider how the persistence of this relation between (human rights) law and the ‘nation-state’ stands in the way of calling for an ‘end of sovereignty’.

Ellen Meiksins Wood in *Empire of Capital* (2003) challenges the conventional view propounded by critics of 'globalisation' who direct their opposition at transnational corporations such as Nike, McDonald's and Monsanto (Wood, 2003, 137-142). There is an assumption among these critics that the role performed by the nation-state for capital – the provision of a 'law' that regulates social, administrative and property relations for instance, is performed by a *lex mercatoria* ('mercantile law') that is not grounded in national law or in a system of international regulation.¹⁸³ It is certainly true that commercial transactions which transcend the boundaries of the nation-state are proliferating. These transactions are regulated by standardised contracts developed by 'professional associations' which are not necessarily rooted in any particular legal order (see Teubner 1997, 15, cited and critiqued by Fitzpatrick, 2001a, 203-04). Wood argues that despite these modes of regularising corporate operations, "no transnational agency, has even begun to replace the nation state as an administrative and coercive guarantor of social order, property relations, stability or contractual predictability, or any of the other basic conditions required by capital in its everyday life" (Wood, 2003, 139). For Wood the essence of 'globalisation' is a global economy administered by 'nation states' (ibid, 141). 'Globalisation' is not accompanied by a "global state" or "global sovereignty".

Wood's view is confirmed by an 'insider' perspective from Phillip Bobbitt in his influential book *The Shield of Achilles: War, Peace and the Course of History*

¹⁸³ It is beyond the scope of this thesis to canvass all the arguments of proponents of *lex mercatoria*. One influential proponent is Gunter Teubner (1997). For useful summation and critique of Teubner and other proponents of *lex mercatoria* as 'global law', see Fitzpatrick (2001a, 203-207).

(2002).¹⁸⁴ Bobbitt announces the emergence of the ‘new constitutional order’ of the ‘market-state’ as a mode of governance that supersedes the nation-state (Bobbitt, xxvii, 228-242). While the function of law in the nation-state was “process oriented”, directed at generating impartial rules and regulations to promote desirable behaviour, the ‘market state’ uses “incentive structures” and “draconian penalties” to prevent the “social instability that threatens material well-being” (ibid, 229).¹⁸⁵ Governance is easier in the ‘market state’ as its ambitions are smaller. Less is demanded by it and less can be asked of it. It features an indifference to ‘justice’ as there is an acceptance that there is no singular set of moral values that can condition it (ibid, 230). Moreover, there is an acceptance that there is no ‘polity’ or ‘people’ that adhere to fundamental values particular to them (ibid). The ‘market state’, then, is a mode of the state that can at once embrace ‘multiculturalism’ and be indifferent to whether a ‘polity’ as a whole is able to exercise the ‘choice’ that the state sustains. Many of the characteristics of the ‘market state’ embrace the criticisms and proposals of critical legal theorists, feminism and other social movements. The indeterminacy of ‘justice’, the absence of a singular essence that can condition and regulate community, the impossible myths that sustained ‘nation’ – all these can be acknowledged and encompassed in a mode of ‘governance’ where each ‘market state’ promises to maximise the opportunity of its members. Bobbitt’s arguments sustain the view that, far from withering away, the state is undergoing one of its many transformations.

I have elaborated the singular-plural (in-finite) spacing of sovereignties by interrogating accounts of ‘worldwide’ sovereign authority which assert that ‘global’

¹⁸⁴ For many years Phillip Bobbitt was adviser to the White House, U.S State Department, and held posts in the U.S National Security Council. He has also been the Senior Director of Strategic Planning in Democratic and Republican Administrations.

¹⁸⁵ Examples of this would be the “target” setting mode of the state, along with draconian penalties for petty offences (‘three strikes and you are in’).

imperial sovereignty has no 'outside'. My discussion of these assertions was pre-figured by the discussion of Nancy's nuanced account of transformations in the source of authority, and thus of 'sense' or 'value' in the 'world'. The possibility of a transcendent 'beyond' as the source of authority has dissipated. This is an account of authority that challenges the 'theologicopolitical' structure of modern sovereignty. That is, the structure of political authority can no longer be sustained by a transcendent power that is either the source of authority - as the God-King, or as the 'people' unified in the State. If authority now 'opens itself up within the world' (Nancy, 1997, 55), then an immanent or 'transimmanent' source of sovereign authority must also be possible. It is this possibility that I discussed through Nancy and Hardt and Negri. In their enumerations of 'empire/Empire' we observed a drive to think sovereignty without domination. Indeed for Nancy it was a case of thinking sovereignty without the elaboration of such a concept (Nancy, 2000b, 36). For Nancy, sovereignty needs to be thought as a 'spacing' or plurality rather than the current mode of political sovereignty as accomplished 'interiority' (ibid). The concept of 'Empire' described by Hardt and Negri, I argued, is exemplary of the claim that there is an end of sovereignty or post-sovereign era. Some make this claim because they see a previously unlimited sovereignty now delimited by law.¹⁸⁶ I have argued that the relation of sovereignty to law always already involves an exposure across a world of delimited singular-plural sovereignties. I have also argued through Fitzpatrick, Wood, and Bobbitt, that the nation-state persists. The claim that a

¹⁸⁶ Neil McCormick for instance claims that we are observing the end of the sovereign state given the legal limitations on sovereign states imposed by the European Union and its laws (MacCormick, 1999, Ch. 8). This account is based, as Loughlin has argued, on opposing a previously unlimited sovereign to a 'now' legally delimited sovereign state in the European Union. I will not pursue a critique of MacCormick's position as a similar problematic is dealt with previously in my treatment of the impossibility of monistic sovereignty in the 'postcolonial' context of Australia (See treatment of *Mabo* (No 2) in *Chapter One*, and discussion of the sovereign/legal 'relation of exception' in *Chapter Three*). For a useful account and critique of MacCormick, see Loughlin, 2003, 75-6.

particular sovereignty has become ‘worldwide’ – that a certain finitude has been made infinite – has been extensively discussed and undermined in this Chapter. The task now is to consolidate my conclusion that it is the ‘infinite-finitude’ of imperial sovereignty that reveals the character of ‘sovereignty as ‘Nothing’.

4.4 Sovereignty as ‘Nothing’

In the preceding discussion I have consistently made the point that imperial sovereignty with no outside – an overarching sovereignty that supersedes a system of nation-states is impossible. I have characterised this impossibility of a fully globalised sovereign power – the impossibility of ‘worldwide’ authority – through what I have termed the *infinite-finitude* of sovereignty. The infinite-finitude of sovereignty connotes the singular-plural spacing of ‘sovereign’ distributions in the ‘world’ (the multiple presences of sovereignty explained through Nancy). This is reinforced by the explanation of ‘world’ which I also drew from Nancy. The ‘world’ as the place of existence discloses the singular-plural exposure of beings. The ‘world’ is the trace of the exposure and transgression of ‘limits’ which separate beings and sovereign distributions. Imperial sovereignty as an ‘open frontier’ and limitless rule is an impossibility precisely because of the multiple delimitations that mark and resist the ‘smooth’, ‘open’, borderless ‘world’ asserted by those who claim that a totalising global sovereignty has emerged. This plural spacing of the ‘world’, as I asserted at the outset of this Chapter, “*is itself the empty place of sovereignty*” because it reveals the persistence of sovereign finitude and delimitation which is always already an exposure across ‘limits’ (Nancy, 2000c, 137, original emphasis). The character of sovereignty as both delimited and also transgressing such limits is the condition of its

im-possibility. The im-possibility of imperial sovereignty is its quality of being delimited and illimitable, finite and infinite. This im-possibility of sovereignty is disclosed, I have argued, through a variety of instances of its in-finitude. Throughout this thesis, then, I have made the point that the finitude of sovereignty is marked by an infinite exposure across limits. The infinite-finitude of sovereignty, the im-possibility of its presence, gives content to Bataille's call which Nancy repeats:

"Sovereignty is NOTHING": Which is to say that sovereignty is the sovereign exposure to an excess (to a transcendence) that does not present itself and does not let itself be appropriated (or simulated), that does not even *give* itself – but rather to which being is abandoned. The excess ... *is not*... . (Nancy, 1991, 18, original emphasis)

Sovereignty has no equivalence. Sovereignty is always already a relation. It is in-division, and an exposure across limits. In claiming that the in-finitude of sovereignty has the character of sovereignty as 'Nothing', I am not claiming that it is a condition that has been attained. The in-finite sovereignty which I have identified in the 'postcolonial' context of Australia, the *habeas corpus* cases in relation to Guantanamo Bay, or the present instantiation of imperial sovereignty discussed in this Chapter is not an instance of the attainment, finally, of 'sovereignty as Nothing'. 'Sovereignty as Nothing', its character as in-finite sovereignty, remains an *im-possibility* which can be explained through Derrida. According to Derrida "[a]n event or an invention is possible only as im-possible" (Derrida, 2003b, 35). The im-possible never appears or announces itself as such (ibid). This is what it means to say 'sovereignty is Nothing'. 'Sovereignty as Nothing' cannot take place as a singular event. A singular sovereignty undercuts itself at the instant of its 'eventness'. The 'event' is always

singular-plural. This rather abstract account needs to be considered in the context of my opening concerns and it is to these that I will now return.

The opening concern of this thesis was, first, to undermine a 'monistic' conception of sovereignty that I identified in the Australian 'postcolonial' context. There we observed that sovereignty was rendered 'finite', singular, in order to disavow its imperial excesses and thus inaugurate a 'postcolonial' law and society. At stake was the possibility of re-presenting the 'political community' of the Australian 'nation' as a 'post-racist', 'postcolonial' society. However, finite sovereignty also had to be capable of infinite reach – that is, it needed to be an 'event' capable of being retained in order to ground present and future law and society. The conflicting tendencies of in-finite sovereignty, at once limited and without limit, is a tension that is sustained because a 'political community', such as 'one nation' and its law, is contingent on retaining and disavowing colonial sovereignty. The second concern of this thesis, then, was to demonstrate that the in-finite character of sovereignty was impelled by the formation, preservation and re-presentation of a 'political community'. I argued that law withdraws in the face of imperial excesses of past or present colonialisms which claim to ground or sustain the political community of 'nation', 'people', democracy and so on. This withdrawal takes place in the face of the sovereign decision on the 'political'.¹⁸⁷ The 'illimitable' sovereign decision, I argued, is in fact delimited by its juridical significance and purchase. The sovereign 'event' takes place through law's unceasing (re)positioning of sovereignty/law. The sovereign decision thus looses what is proclaimed to be its pure facticity, its character

¹⁸⁷ Recall the non-justiciability of the 'act of state' in *Mabo* (*Chapter One*); the insistence of one law, one jurisdiction in Australia in the context of rejecting the normative potential of Aboriginal law (*Yorta Yorta* (2002) discussed in *Chapter Two*; and the discussion of Schmitt, Agamben, and Nancy in relation to the person 'abandoned' in the camp in *Chapter Three*.

as an 'excess'. The decision on the 'political', or put another way, law's attempt to sustain its deference to sovereignty in the name of the political, is an im-possible 'event'. The im-possible event of sovereignty, I argued, is 'singular-plural'. It is neither fully contained by a 'limit', nor absolutely unconditioned by the relations to which it is exposed.

I will now draw my enquiry to a close by examining what my account of infinite sovereignty contributes to the concerns with which I opened. Does the concept of an im-possible, in-finite sovereignty, sovereignty as 'Nothing', offer insights for resisting imperial instantiations of sovereignty? I will address this question by returning to the empirical contexts examined in this thesis: the 'postcolonial' context of Australia and the neo-imperial sovereign excess and its relation to 'jurisdiction' in the context of indefinite detention in Guantanamo Bay. It is among these textured contingencies of imperial sovereignty that we must consider the implications of 'sovereignty as Nothing'.

4.4.1 'Postcolonial' Sovereignty as 'Nothing'

"We, the peoples of Australia, of many origins as we are, make a commitment to go on together in a spirit of reconciliation". This is the opening sentence of the *Australian Declaration Towards Reconciliation* (Council for Aboriginal Reconciliation, 2000 – see Appendix I for full text).¹⁸⁸ The *Declaration* is premised

¹⁸⁸ I have returned to consider the Australian 'postcolonial' context through this *Declaration* as it brings together a number of themes that were addressed in *Chapters One* and *Two* such as the problematic of in-finite sovereignty and the insistence of One 'law of the land' and One political community of the Australian 'nation'. I will address these themes in the course of the discussion that follows.

on a presumed and insistent 'commonality'. Reconciliation is supposed to be the basis for a 'postcolonial' future – a work of remembering, forgiving and forgetting, a promise 'towards' which the former 'colonies' will journey. But a singular 'We' is the first word, the ground, of this future. It is followed, in the text, by the recognition of a plurality of 'peoples' with 'many origins' but then returned, subordinated, to a 'being together', a 'spirit' no less, of reconciliation. What holds this plurality of peoples with their 'many origins' together? It is, unsurprisingly, a concept of sovereignty in its original imperial terms: "We recognise this land and its waters were settled as colonies without treaty or consent" (ibid). This is an admission, a confession, but importantly a preservation of a sovereign assertion which is at once finite (an event that took place 'back then'), and infinite (it can never be parted from or addressed). The *Declaration* repeats the colonial assertion of sovereignty in the 'original terms' of a 'settlement' of land and waters "without treaty or consent" (ibid).¹⁸⁹ Thus the colonial appropriation of land is recognised but elevated beyond question (infinite). The lack of treaty or consent must not get in the way of redeeming the past for the sake of a future, and thus inaugurating a new law and society. The colonial sovereign event is lightly marked as an abomination, but one that ultimately cannot be wholly left behind. The imperial assertion of sovereignty cannot be exceeded, after all, what could exceed this, what could overwhelm it?

The *Declaration* was the end-product of a process commenced by the *Council for Aboriginal Reconciliation Act* 1991 (Cth). The Council for Aboriginal Reconciliation sought to consult widely among 'all' Australians and set out a strategy for promoting reconciliation. The Council spent a decade in community consultation. In this same period, the production of a postcolonial society and juridical order through the recognition of native title, for the most part, failed to deliver land, self-determination or wider recognition to indigenous communities. The process of recognition of indigenous peoples' antecedent property rights, as I indicated in *Chapter Two*, confirmed the appropriation of indigenous land by the state and the consequent extinguishment of native title, rather than result in the land being returned to its original owners. By the end of the 1990s, and with the evident failure of native title as a vehicle for restorative justice, reconciliation gained momentum as one of the strategies for producing a 'postcolonial' society. The *Declaration*, as we will see, provides a succinct encapsulation of the problem of in-finite sovereignty and its relationship to 'political community'.

¹⁸⁹ Recall that settlement should have been reserved for uninhabited territories. See discussion of Mabo (No 2) in *Chapter One*, section 1.1.1.

The solution turns out to be yet another imposition of a juridical order with a superior law. The basis for recognising the previously excluded is a new inscription of an absolute, unavowable Law: “Reaffirming the human rights of all Australians, we respect and recognise continuing customary laws, beliefs and traditions” (ibid). The colonial assertion of sovereignty is crystallised in the unity of a ‘nation’ of ‘peoples’ with ‘many origins’ (ibid). But plural ‘cultures’ are only recognised providing they conform to the overarching law of the “human rights of all Australians” (ibid). This is where reconciliation must be assessed in the context of the ‘extinguishment machinery’ of native title. As we observed in *Chapter Two*, any ‘traditional or ‘customary’ norm that conflicts with ‘Australian law’ must give way to the latter.¹⁹⁰ Where there is no Aboriginal law, there can be no native title. In *Fejo* the High Court of Australia insisted that ‘traditional law and custom’ cannot be treated as a parallel law making system. To do so would be to “deny the acquisition of sovereignty” (*Fejo*, (1998), para. 44).

As the *Declaration* reiterates, Aboriginals and Torres Strait Islanders may have ‘self determination’, but it has to be “within the life of the nation” (ibid). The ‘postcolonial’ nation vows to go on, into a future, as a movement ‘towards’ reconciliation. But this must be One ‘nation’ which abides by One law. There are, then, at least three moments of the ‘postcolonial’ condition where a ‘singularity’ is asserted in the *Declaration*. The first is the event of the colonial assertion of sovereignty. The second is the terms of its alteration which re-inscribes One law, Australian law, which is based on the common law of England which the colonial

¹⁹⁰ See the discussion of *Fejo* (1998) in *Chapter Two*.

settlers brought with them. The third is the insistence of One community in the form of the 'nation'. I want to argue that all three 'postcolonial' moments appeal to a singularity which can be resisted through the notion of sovereignty as 'Nothing'.

Sovereignty as 'Nothing' resists a singular sovereign event. Moreover, the im-possible character of sovereignty as 'Nothing' offers a means of resisting its re-imposition. If sovereignty as 'Nothing' is regarded as a singular-plural spacing, an exposure and sharing out across a 'limit' which thus fails to contain and insulate the sovereign event as such, then the colonial sovereign moment is disrupted through its own being or existence. A singular sovereignty undercuts itself. The sovereign event as a plural spacing, an exposure across a limit, is an 'empty place'. This is why the original imposition has to be repeated again and again. The foundation never succeeds in permanently establishing the colony, law, people, or 'nation'. In another register, the plurality of law and community (of the colonised, the marginal), refuses to be effaced regardless of the Absolute terms in which One sovereignty, One nation and One law are re-iterated.¹⁹¹ In the 'postcolonial' context of Australia, the colonial sovereign event, either as the foundation of the common law or the ever pervasive ground repeated in the aspirational *Declaration* of reconciliation, is asserted as singular and substantial. But such an event is an im-possibility. Sovereignty as 'Nothing' discloses, to the extent that it is an im-possibility, the contours of a failure which is in fact the event of resistance. This resistance opens within the sovereign event to the extent that sovereign finitude is always exceeded.

¹⁹¹ For an excellent example of how Aboriginal law would continue to allocate entitlement regardless of what the Australian common law says about extinguishment of native title, see the discussion of extinguishment by the Aboriginal lawyer, Noel Pearson, 1997, 150-162.

Colonial sovereignty cannot be contained in the past nor prevail in the present without the question of its legitimacy disrupting it again and again. As we observed in *Mabo (No 2)* and in the *Declaration*, the colonial assertion of sovereignty, the still abhorrent settling of an inhabited territory, must be repeated at a 'postcolonial' time when it needs to be forgotten. At the very instance of a confession, a quest for forgiveness, there is a re-inscription of the violence. *'Postcolonial' sovereignty fails precisely because it cannot leave the colonial behind, 'once-and-for-all'*. Note the 'postcolonial' dilemmas captured in this phrase. Sovereignty cannot be 'once' in time (finite), it cannot be for 'all' time (infinite), and it is not an adequate foundation 'for all' communities, either coloniser or colonised. The persistence of these elements haunts 'postcolonial' sovereignty. 'Postcolonial' sovereignty fails to escape the past, it cannot be legitimate in the present, nor can it be the basis for the new 'We' of the future. The notion of in-finitude I have elaborated in this thesis thus explains the structure of 'postcolonial' sovereignty. But what are the implications of this for 'postcolonial' societies, and in particular for indigenous communities who seek to overcome the limits of the coloniser's in-finite sovereignty? I want to address that question, tentatively, by commenting on the implications of the in-finitude of sovereignty for the aspiration of self-determination.¹⁹²

¹⁹² I do not intend this reference to self-determination in this summation to be regarded as an exhaustive treatment of 'self determination'. Indeed, there is a lengthy discussion that might be had on whether 'self determination' will avoid the pitfalls of singular sovereignty or a community based on some essence. Such a discussion can be informed by my analysis which de-positions monistic sovereignty and gives an account of law at the limits of the 'political'. However, I have not attempted to undertake that discussion in this thesis as my principal concern has been to de-position imperial sovereignty. For discussion of indigenous self-determination see: Pearson, 1993, 14-17; Nettheim, 1993, 234-35; and for a more nuanced corrective, Watson, 2003.

My account of ‘postcolonial’ sovereignty as ‘Nothing’ - treating sovereignty as singular-plural, a sharing across limits - has several implications for emancipatory projects which seek ‘self determination’. As Derrida recently pointed out:

One cannot combat, *head on*, *all* sovereignty *in general*, without threatening at the same time, beyond the nation-state figure of sovereignty, the classical principles of freedom and self-determination. (Derrida, 2003b, 49; original emphasis)

Derrida offers this caution having considered the current fragility of nation-state sovereignty (ibid, 44-48). The concept of sovereignty as “indivisible” and “unsharable” is now precarious because of the inroads made by “universal human rights” (ibid, 45). I will return below to consider how an indivisible, exceptional, sovereign power in current ‘world’ conflicts, such as the ‘war on terror’, is also being pushed towards the character of sovereignty as ‘Nothing’. Persisting with the ‘postcolonial’ context of Australia for the time being, it is possible to observe Derrida’s claims borne out. The movement towards a ‘postcolonial’ law and society in Australia can at least partly be explained by the inroads made into the nation-state by international human rights norms. For instance, the principal reason the High Court in *Mabo* departed from previous authority in order to recognise indigenous peoples’ antecedent property rights was that a new era of respect for human rights demanded a move away from an age ‘frozen in racial discrimination’ (See *Mabo*, 41-2). Indeed, this was the key moment that heralded the ‘postcolonial’ aspirations of the decision in *Mabo*. It is offered as the reasons why previous authority could not stand. International norms had evolved and Australia had to change along with them, or so the story goes. The *International Covenant of Civil and Political Rights* 1966 (ICCPR) had pushed a number of signatory states to pass laws which guaranteed civil

and political freedoms. The *Racial Discrimination Act 1975* (Cth) (RDA) was passed to implement aspects of that international treaty in Australia. The RDA was central in defeating the Queensland Government's attempt to frustrate Eddie Mabo's application for the recognition of native title rights by passing legislation to retrospectively extinguish any native title in the Murray Islands. The legislation was struck down by the High Court as it was judged to be racially discriminatory (see *Mabo v Queensland (No 1)* (1988)). The International Court of Justice (ICJ) *Advisory Opinion on Western Sahara* (1975) also played a crucial role in invalidating the application of the doctrine of 'settlement' to inhabited territories. The doctrine of settlement was usually reserved for uninhabited territories, unless the natives were judged to be 'too low in the scale of social organisation'. The ICJ decision at least served to emphasise the need to adjust the 'consequences' of 'settlement' (the recognition of native title rights) even though the actual acquisition of sovereignty was left 'non-justiciable' or beyond the purview of municipal courts.¹⁹³

The impact of international human rights norms and institutions on municipal law and sovereign authority is thus significant. In these developments we observe that the sovereign nation-state is at once 'conditional' and 'unconditional' (Derrida, 2003b, 49). It is 'conditional' to the extent that it is susceptible to the externally determined norms of the international community. At the same time, as Derrida pointed out, sovereignty is 'unconditional' and 'indivisible' (ibid, 49). Although this aspect of sovereignty must always be considered along with the 'sharing', the infinitude, and thus the im-possibility of sovereignty, the 'unconditional' aspect of sovereignty can be a "bulwark" against domination, it can stand against:

¹⁹³ See discussion of the *Mabo* in *Chapter One*.

certain ideological religious, or capitalist, indeed linguistic, hegemonies, which, under the cover of liberalism or universalism, would still represent, in a world that would be little more than a market, a rationalisation in the service of particular interests. (ibid)

‘Self determination’, inevitably, challenges *and* relies on this unconditionality of sovereignty. The call for indigenous self-determination refuses the illegitimate usurpation of territory and variously seeks independence, self-government, power-sharing, redistribution of wealth, and a plurality of laws. To that extent self-determination challenges the ‘unconditionality’ of a settler colony’s sovereignty. That is, there is always a call for justice and legitimacy - put another way, a call of and for another law, which sits alongside the sovereign plenitude asserted by the coloniser.

But what would it mean for colonial authority to be undone, ‘*once-and-for-all*’? If this was done in the name of de-colonisation or ‘postcolonial’ self-determination, would the sovereignty which is the means and the end of this emancipation be any less problematic? Indeed, my analysis suggests that all sovereignty is im-possible. If self-determination is expressed through the notion of sovereignty, it would be no less problematic, no less im-possible or in-finite. But this speculation is not particularly relevant since indigenous communities within settler colonies are consistently refused sovereign independence (recall *Coe (No 1)* (1979) and *Coe (No 2)* (1993)).¹⁹⁴ What is significant is that the in-finitude of sovereignty which I have described should inform claims to self-determination. What my elaboration of in-finite sovereignty has to offer the ‘postcolonial’ enterprise of

¹⁹⁴ For an account of the protracted negotiations on the UN sponsored process to arrive at a Draft Declaration on the Rights of Indigenous people, see Washington, 1998. A detailed treatment of this process is beyond the scope of this thesis.

resisting colonial impositions is this: ‘postcolonial’ sovereignty is an im-possibility. This im-possibility is the event of a community which resists colonisation. The fact that sovereignty cannot be ‘finite’ or ‘infinite’ and thus a fully elaborated totalisation is the event of more-than-one law, more-than-one community. The possibility of these pluralities is the event of ‘postcolonial’ law and society. These are the modest implications of my thinking on sovereignty as far as it concerns the ‘postcolonial’ context.

4.4.2 Sovereign Exception as ‘Nothing’

In this Chapter I have principally focused on de-positioning imperial sovereignty by critiquing a contemporary and influential account of it (Hardt and Negri, 2000). In considering what it would mean for sovereignty to be ‘Nothing’ in the context of ‘worldwide’ sovereign authority, I drew on Nancy to argue that the ‘becoming worldwide’ of sovereignty implies “sovereignty without sovereignty” (Nancy, 2000c, 134, 136-140; see section 4.1.2 above). If the notion of a ‘world’ without domination indicates a singular-plural gathering, then this ‘gathering’ must be liberated from ‘sovereignty’ as the essential organising principle of a ‘world order’. For Nancy, this calls for sovereignty as ‘Nothing’. Sovereignty as ‘Nothing’ involves focusing on the singular-plural spacing of being, a spacing that is not reduced to the “concentration of interiority” required by the re-presentation of political community through sovereignty (Nancy, 2000b, 36; see section 4.2.1 above). I developed this analysis of sovereignty as ‘Nothing’ by comparing Nancy and Hardt and Negri’s approach to ‘empire/Empire’ (see section 4.2.1 above). The principal difference between Nancy’s and Hardt and Negri’s approach to ‘worldwide authority’ is this:

Nancy calls for a 'world' (singular-plural spacing) not determined by a distribution of sovereignties given content by an 'essence' (of 'people', 'nation', societies which respect 'human rights' contrasted with 'outlaw', 'barbarian' states etc). Hardt and Negri on the other hand announce the disappearance of the 'limits' by which modern sovereignty has been articulated. They assert the emergence of a 'new' juridical configuration of sovereignty called 'Empire'. Empire is the new mode of sovereign hegemony which is characterised by an 'open', smooth, world without limits. I responded to the collection of claims accompanying their account by arguing that 'worldwide authority' is in fact characterised by the *in-finitude* of sovereignty. Through the notion of in-finitude I drew attention to the persistence of 'limits', but more fundamentally, to the exposure and transgression of a 'limit' which thus fails to 'contain' or delimit sovereignty. The in-finitude of sovereignty implies the 'empty place of power', the im-possible sovereign event, and thus sovereignty as 'Nothing'. I will close this Chapter by returning to the issue of hegemonic, imperial sovereignty as it was considered through the instance of indefinite detention of persons in Guantanamo Bay. I will do so through a recent account of international law that squarely and commendably refuses to separate the exceptional sovereign decision on 'war' from the juridical mediation or legal legitimisation of such actions. It is the im-possible separation of the sovereign exception from law that gives some content to the claim that sovereignty is 'Nothing'.

According to a recent commentary on international law, the hegemony of 'Great powers' has long been more than a political fact – it is embodied in international legal norms and institutions (Simpson, 2004, Ch. 3). Thus the archetypal monistic conception of sovereignty, the singularity of the (imperial) 'international

citizen' whose sovereignty is more equal than others, turns out to be heavily mediated by law. The political exigencies of Great powers turn out to be legalised (ibid, Chs. 4-7). International hegemony of certain sovereigns is a 'legalised hegemony' (ibid, 68). That much may be obvious, though hardly acknowledged by international lawyers. Hence Simpson's intervention is significant. Simpson argues that although the international legal order is based on the notion of 'sovereign equality' (each state is formerly equal to any other) and 'existential sovereignty' (each state has autonomy within its borders), 'Great powers' have been granted a form of 'legalised hegemony', a prerogative, based on the international constitutional recognition of their ability to collectively act in their own interests against 'outlaw' states (ibid, 67-76).¹⁹⁵ After a detailed and persuasive treatment of the international norms and instruments which sustain his claim, he concludes his account of the relationship between 'Great powers' and 'outlaw states' with reference to the detention of persons in Guantanamo Bay. He claims that:

The US detention of Taliban personnel and the labelling of these individuals as 'illegal combatants' purports to place them outside the full protection of the law (i.e. the law of the Geneva Conventions as it applies to POWs) while their place of detention can be viewed as a metaphor for the treatment of outlaws generally. Guantanamo Bay is a place outside the law: an extra-territorial, extra-constitutional locale where the rules of domestic law and international law are suspended and yet where the suspects or detainees ... are closely

¹⁹⁵ I have omitted reference to the international instruments and cases by which Simpson validates his claims as these are beyond the scope of this thesis. Note that Simpson distinguishes 'legalised hegemony' from 'superpower dominance' because of the collective character of this hegemony (Simpson, 2004, 74).

Though I draw on Simpson here in order to sharpen the focus on international sovereignty, I dealt with the in-finitude of sovereignty in the 'international order' in a detailed way in *Chapter One*. There I claimed that the separation between international/nation is an im-possibility that can be expressed through the notion of the '*parergon*', a frame that is indeterminately inside and outside what is contained 'within' it. The limit between international/nation sustains this indeterminacy.

monitored and controlled. Like the outlaw states from which they hail, outlaw personnel are both outside the law and at the same time entangled in its terrors and violence. (ibid, 325)

Two qualifications must immediately be added to this statement. First, Simpson did not have the benefit of reading the U.S Supreme Court decisions in *Rasul* (2004) or *Hamdi* (2004) before his book went to print.¹⁹⁶ In those cases the Supreme Court held that U.S Federal Courts have jurisdiction over the ‘custodians’ of persons being detained. Due to this assertion of the governmental role of the courts, the detainees are no longer utterly ‘outside’ the law.¹⁹⁷ Second, the metaphor between ‘outlaw’ detainees and the ‘outlaw states’ from which they hail fails because of the number of detainees in Guantanamo Bay who are citizens of states allied with the U.S (Australia, Kuwait, Pakistan, Saudi Arabia to name a few). The detainees may well be entangled in the terrors and violence of ‘Great powers’, but for the likes of *Rasul* (a UK citizen) or David Hicks (an Australian citizen), it cannot be claimed they are caught up in the terrors of outlaw states from which they hail.

What is useful for my purposes in Simpson’s analysis is the extent to which Guantanamo Bay serves as a signifier of ‘extra-legal’ space. But Simpson has a difficult time maintaining the delimitation of the ‘extra-legal’. Simpson places the detainee ‘inside’ (criminalised personnel of ‘outlaw states’) and ‘outside’ law (the extra-legal conditions in which the detainee is held). The ‘extra-legal’, the ‘outlaw state’, turns out to be more like an international variety of ‘criminal’ who has transgressed the norms determined by the ‘Great powers’. The territory of Guantanamo Bay and persons detained there are not ‘outlaws’ in the sense of being

¹⁹⁶ It should be noted that the early position in *Rasul* (2002) which placed Guantanamo Bay beyond the sovereign territory of the U.S was countered by the majority view in *Gherebi* (2003).

¹⁹⁷ See my lengthy account of these cases in *Chapter Three*.

‘outside’ one regime of law and encompassed in the separate, ‘exceptional’ law of the sovereign. Simpson claims that the ‘outlaw state’ is in fact subject to a “separate legal regime” (ibid, 313). Analogous to “common criminals”, these states are subject to “surveillance and occasional disciplinary violence” (ibid, 313-14). For Simpson the sovereign exception is an instance of the extra-legal, or the ‘outlaws’ are brought ‘within’ through special ‘criminal’ measures. My thesis offers a corrective to these sovereign delimitations which I have characterised as im-possible. The discourse that criminalises the ‘outlaw’ state and its ‘personnel’ only serves to legalise hegemony. Combating the ‘criminal’, the ‘outlaw’, the ‘enemy’ – these are means of validating an excessive power which will continue to transgress a ‘limit’ that must and cannot contain it.

The sovereign exception in the ‘war on terror’ – what Simpson would term the prerogative of ‘Great powers’ in international law to disrespect the sovereign equality of the ‘outlaw state’ and wage war against it – is in fact the ‘event’ of ‘Great powers’ faced with the *lack of sovereignty*, the absence of a sovereign against whom war can be waged. The ‘criminalisation’ of the ‘outlaw state’ is a “projection” (Derrida, 2003b, 47). As Derrida put it:

The United States and its allies, as well as the international institutions that depend largely on them for their daily operations (the Security Council, if not the entire UN), no longer face an identifiable enemy in the form of a “state” territory with whom they would wage what would still be called a “war”, even if it’s a war on international terrorism. (ibid, 46)

The sovereign exception, viewed in the light of international law, is an exposure across a limit of sovereign subjectivity. Sovereignty is not contained within the

boundaries of 'equal', 'plural' sovereigns determined and recognised by international law. The sovereign exception in the war on terror is im-possible. A collection of sovereigns wage a war against a *cipher*. Moreover, the sovereignty of 'Great powers' is in-finite to the extent that it is neither an overarching 'world' sovereignty (Empire) nor is it contained within nation-state boundaries (finite) implied in the notion of an international system of sovereigns. Sovereignty always transgresses its limits - it is in-finite. The in-finitude of sovereignty is the condition of sovereignty as 'Nothing'. This is not a condition that has been accomplished, but rather, an opportunity which may offer the interstitial point of resistance to sovereign excesses. As Derrida has put it, all states are *rogues* (Derrida, 2003b, 47). The sovereign nation-state need not be allowed the 'substantiality' or 'presence' that decisionism or internationalisms assume.

Conclusion

The opening concern of this thesis was to provide an account of the relation between colonial sovereignty and law. Drawing from the telling instance of Australian law's attempt to recognise the antecedent rights of indigenous people, we observed that the law characterises sovereignty as 'finite' in order to disavow imperial racist excesses and thus inaugurate a 'postcolonial' law and society. At stake in such an enterprise is the possibility of re-presenting the juridical order and 'political community' as 'post-racist' or 'postcolonial'. However, imperial sovereignty, we observed, must also be capable of infinite reach. That is, sovereignty needs to be an 'event' capable of being retained in order to ground present and future law and society. Imperial sovereignty and its racist negations thus continue to haunt the 'postcolonial' juridical order and polity. I argued that the contradictory lineaments of in-finite sovereignty are sustained in the name of a purportedly singular, unified 'political community' such as the nation-state.

The second concern of this thesis, then, was to demonstrate that the contradictory lineaments of sovereignty as finite and infinite are sustained with reference to 'political community'. For instance, law withdraws in the face of imperial excesses of past or present colonialisms on the basis that (imperial) sovereignty purportedly grounds, symbolises or sustains the political community of 'nation', 'people', and democracy. The re-positioning of imperial sovereignty is contingent on maintaining the stability of the 'nation'. The sovereign 'event' takes place through law's unceasing 'positioning' of sovereignty/law with reference to the stability or security of the political as 'nation', community of human rights,

democracy and so on. Sovereignty thus loses its unicity, its purportedly pure facticity in the process of its juridico-political instantiation. Law's inscription of the 'position' of sovereignty with reference to the 'political' means that the facticity or 'presence' of sovereignty is an im-possible 'event'. Sovereignty is neither fully contained within a 'limit', of 'nation' for instance, nor absolutely unconditioned by its relation with a nation's law. Moreover, the enquiry was not confined to the in-finitude of sovereignty in relation to national juridical orders. The discussion dealt with the possible criticism, via Hardt and Negri, that sustained concern with 'postcolonial' sovereignty and its position in a national juridical order, or the neo-imperial extraversions of a state such as the U.S, is no longer a pressing concern in a new imperial age marked by the emergence of a new form of 'global' sovereignty called 'Empire'.

Throughout the discussion the critique of finitude derived from Jean-Luc Nancy was central for the purposes of studying imperial sovereignty. The key insight, one that facilitated the treatment of imperial sovereignty in the 'postcolonial' context and in the wider discussion of 'worldwide' sovereign authority, was the importance of the notion of 'finitude' for examining the position, limit and relation between sovereignty and law. At the outset, when setting out Nancy's thought, I identified the importance of devising the conceptual apparatus to imagine what it would mean to move sovereignty to a 'non-place'. By the end of the discussion in *Chapter Four*, I had developed a set of insights that offered some basis for imagining what it would mean for sovereignty to be moved to a 'non-place' – for sovereignty to be 'Nothing'. Sovereignty as 'Nothing', to repeat, is not a condition that has been accomplished, but rather, it is an opportunity to exploit the 'weakness' of the infinite

exposure of sovereignty across limits. It is the singular-plural spacing of all being that should inform the thought of community, the concept of the 'subject', and the juridico-political approaches to her emancipation. Before setting out some of these broader implications of the thesis, it is convenient to identify its key insights by recounting the argument advanced in each Chapter.

Chapter One identified the finite and infinite character of sovereignty in Australian 'postcolonial' law. It considered cases which purport to separate colonial law from its imperial origins. The problematic was posed in terms informed by the thought of Jean-Luc Nancy. Nancy has consistently argued that a 'limit' that separates absolutely is impossible. Drawing on this insight I argued that there can be no absolute ground from which law can originate or depart. The event of 'postcolonial' law and community arises from the failure of such a ground. The question of 'postcolonial' justice must thus endlessly grapple with the persistence of imperial sovereignty that is the in-finite ground of law. But this persistence of the colonial in the 'postcolonial' condition of law and society is an opportunity that enables a resistance to the unitary, 'pure fact' of sovereignty. The 'substantiality' that might be attributed to sovereignty, one that would instantiate yet another closure, can be disabled by exposing the necessary relation by which sovereignty is constituted and re-constituted. The monistic character of sovereignty is de-positioned when it is demonstrated that it is im-possible, but yet necessary, to separate 'postcolonial' sovereignty from its erstwhile imperial form. This ambivalence marks a failure of imperial sovereignty.

Chapter Two extended the critique of in-finite sovereignty by considering how conceptions of monistic sovereignty are maintained through the insistence of a unitary ‘political community’ in the form of the nation-state with one law. The political and juridical concomitant of monistic sovereignty is the refusal of plurality (of law and community). I examined recent ‘native title’ cases from Australia which have insisted on subjecting the ‘postcoloniality’ of Australian law and society to unitary instantiations of ‘political community’. ‘One law of the land’ is wrought through the insistence on an essential ground for indigenous law and community, such as ‘traditional law and custom’. To make this argument I drew on Nancy’s interrogation of the notion of ‘jurisdiction’. ‘Jurisdiction’ manifests the co-presence of sovereignty, law and the political. Jurisdiction, or ‘juris-fiction’ as Nancy put it (Nancy, 2003b, 157), expresses the performativity of the judicial decision when marking out the space, territory and ambit of sovereignty/law. When this territorialisation of law is articulated with reference to a delimited political community, the effect is also to delimit what is otherwise regarded as beyond limit – the (il)limitable power of sovereignty.

Chapter Three more specifically considered the ‘limit’ between sovereignty and law through the notion of jurisdiction. The *habeas corpus* cases in relation to the detainees in Guantanamo Bay disclosed, yet again, that the in-finitude of sovereignty is instantiated in and through law. The Supreme Court of the United States recently acceded to the governmental concern of controlling officials who detain prisoners in Guantanamo Bay (*Rasul* (2004)). But this did not clearly address the abject condition of the detainee as such. The ‘camp’, though seemingly ‘outside’ the juridical order, is actually central to the neo-imperial project. The ‘camp’ marks the infinite opening

out of sovereignty, its illimitable power, but also reveals the de-positioning of sovereignty and law. The mark of the sovereign 'ban' must be brought to bear on the (racialised) body of the detainee. It is this abandonment, this sacrifice, which produces the event of imperial sovereignty. The life of the being abandoned in the 'camp' thus exposes the sovereign and discloses the limit of the juridical order and political community. Law's delimitation of jurisdiction and adjustment of 'due process' to facilitate the exigencies of a sovereign at war offers little redress to the 'abandoned' being. It is not a monistic sovereign, then, that renders this abandoned life beyond the mediation of civil law. 'Abandonment', wrought by sovereign power and law, marks the limit between sovereignty and law. What this analysis exposes is that the decision on friend/enemy cannot be attributed solely to a decisionist sovereign, but rather to the judicial treatment of the complex notion of jurisdiction.

The argument consistently developed throughout the thesis was that sovereignty is finite and infinite. *Chapter Four* thus dealt with the question of whether sovereignty has surpassed being delimited within a finite territory and has so thoroughly encompassed the 'world' that it is now a finitude that has become infinite – an 'Empire' without limit. I emphasised that 'imperial sovereignty' or 'empire' must be understood as the infinite plurality of finitudes, what I termed *infinite-finitude*. I refuted the claim by Hardt and Negri that an infinite sovereignty had emerged. I pointed out that for Nancy the plural spacing of the world "is itself the empty place of sovereignty" (Nancy, 2000c, 137). By comparing Nancy's account of authority becoming 'worldwide' with Hardt and Negri's account of 'Empire', I explored what it means for sovereignty to be 'Nothing', for sovereignty to occupy a 'non-place' (Nancy, 2000c, 137). Sovereignty as 'Nothing' involves conceiving of

community as the spacing and exposure of singular beings, rather than the ‘unified’ entity that is symbolised through sovereignty.

A question that arises out of the enquiry, one that I wish to close with, and one that has been amply expressed through Nancy, and also Derrida (2003b), is whether community needs sovereignty. Will the call to seek an ‘empty place of sovereignty’ also mean that ideas of the political, self-determination, democracy, community, fraternity are discredited? Like sovereignty, each of these is in need of eradication *and* preservation, and I see no way out of this conundrum. What I suggest, and this is not entirely novel, is that ‘we’ cannot but live with this irresolution. What has been suggested in the discussion is that politics and juridico-political thinking must be informed by the critique of finitude (of sovereignty, community etc.). Some approaches to living with the paradox of sovereignty which must be ‘Nothing’ but also a non-place can be drawn from this enquiry. There can be no self-determination without sovereignty – but this must not be a sovereignty of ‘brilliance’ and ‘finishing’ (Nancy, 2000c, 140). The limit, ‘we’ must understand, can never be closed absolutely. The ‘empty place of sovereignty’ must be a place, but what place – and what should be the measure of belonging to it?

Nancy’s approach to the spacing of ‘empire’ offers some insights. The ‘spacing of empire’ is a problem which arises out of the impossibility of delineating a source of ‘sense’ – transcendent or immanent – from which authority can be derived (Nancy, 1997, 5-6). Authority should not come from inside or outside a particular ‘political space’ such as ‘Occidental culture’ because the latter’s presence is no longer, as if it ever was, self-evident. Authority is plural, contested and contingent.

The finitude of being which is also always 'being-in-common' must be informed by a thinking of 'world' as 'being toward' (ibid, 8) – and 'being toward' *other* senses of 'world'. This is partly the answer also to the disturbing return of religion as a source of sense/authority in the post cold war era. Binary oppositions of occident/orient or the oppositions in-between monotheistic religions cannot be sustained. Community must not be re-grounded on such essences. For the time being, it seems preferable to live with-in sovereignties which can be de-positioned and divided (by law) than to embrace utopian eschatologies which eschew law in the hope that we will not need it tomorrow.

Appendix I

Council for Aboriginal Reconciliation (2000), *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament*.

Australian Declaration Towards Reconciliation:

We, the peoples of Australia, of many origins as we are, make a commitment to go on together in a spirit of reconciliation.

We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of lands and waters.

We recognise this land and its waters were settled as colonies without treaty or consent.

Reaffirming the human rights of all Australians, we respect and recognise continuing customary laws, beliefs and traditions.

Through understanding the spiritual relationship between the land and its first peoples, we share our future and live in harmony.

Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.

Reconciliation must live in the hearts and minds of all Australians. Many steps have been taken, many steps remain as we learn our shared histories.

As we walk the journey of healing, one part of the nation apologises and expresses its sorrow and sincere regret for the injustices of the past, so the other part accepts the apologies and forgives.

We desire a future where all Australians enjoy their rights, accept their responsibilities, and have the opportunity to achieve their full potential.

And so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation.

Our hope is for a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all.

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